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THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ALASKA

ALASKA COMMUNITY ACTION ON TOXICS, *et al.*, Plaintiffs, v. AURORA ENERGY SERVICES, LLC, *et al.*, Defendants.	Case No. 3:09-CV-00255-TMB **PLAINTIFFS' MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT**

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INTRODUCTION

The Clean Water Act ("CWA" or "the Act") prohibits "the discharge of any pollutant by any person" unless that discharge is authorized by a permit. 33 U.S.C. § 1311(a). This case alleges direct discharges of coal from the Seward Coal Loading Facility ("SCLF" or "Facility") into Resurrection Bay and ponds and wetlands. *See* Complaint (Doc. 1) at ¶¶ 1, 48-75. These discharges take place on an ongoing basis whether there is precipitation or not. In fact, these discharges are in no way caused by, or the result of, stormwater running off any part of the SCLF. Further, the discharges of coal are not covered by Defendants'[1] regulation under the Multi-Sector General Permit for Stormwater Discharges Associated with Industrial Activity ("Stormwater Permit" or "MSGP").[2] Moreover, the discharges are explicitly excluded from coverage under the Stormwater Permit.

Defendants have no CWA permit authorizing the direct discharges of coal at issue in this lawsuit from the SCLF. The CWA prohibits the discharge of pollutants from a point source into waters of the U.S. without NPDES permit authorization for that direct discharge. *See Envtl. Def. Ctr., Inc. v. U.S. EPA*, 344 F.3d 832, 841 (9th Cir. 2003). The discharges identified in this citizen suit, therefore, violate the CWA.

Defendants mischaracterize ACAT's claims[3] by asserting that "[e]ssentially, Plaintiffs object to" (1) the fact that stormwater discharges from the SCLF are permitted under a General Permit[4] by the U.S. Environmental Protection Agency ("EPA") and the Alaska Department of

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[1] Aurora Energy Services, LLC ("AES") and Alaska Railroad Corporation ("ARRC") are referred to throughout this brief collectively as Defendants.
[2] *See* Ex. 1 to Plaintiffs' Motion for Summary Judgment ("Pltffs. MSJ") (Doc. 120-1).
[3] Plaintiffs Alaska Community Action on Toxics and the Alaska Chapter of the Sierra Club are collectively referred to as "ACAT."
[4] CWA permits for discharges under section 402 of the Act can take one of two forms: an individual permit or a general permit. An individual permit, as the name implies, is a permit for an individual facility while a general permit covers an entire group or category of similarly situated but separately located facilities. The Stormwater Permit that authorizes stormwater discharges from the SCLF is a general permit. ACAT does not contend that Defendants should

Environmental Conservation ("DEC"), and (2) that EPA and DEC have regulated air emissions under air emission regulations rather than the CWA. *See* Defendants' Motion for Summary Judgment at 9[5] ("Def. MSJ") (Doc. 112).

ACAT has never objected to the Defendants' Stormwater Permit and takes no issue with application of air emission regulations to the SCLF. However, importantly, neither the Stormwater Permit, nor any air emission regulation, provides Defendants with immunity from liability under the CWA for the coal discharges at issue in this suit. Regulation by DEC or EPA of the SCLF's stormwater discharges under stormwater regulations or air emissions under air regulations in no way exempts Defendants from complying with the CWA for non-stormwater discharges.

This case involves direct discharges of coal into Resurrection Bay and ponds and wetlands. Because Defendants have ongoing discharges of coal, completely unassociated with stormwater, into Resurrection Bay and/or ponds and wetlands, they must obtain a separate CWA permit for those non-stormwater discharges. ACAT seeks an order from the Court enjoining Defendants from continued violations of the CWA by requiring that Defendants secure – and comply with – a permit for those discharges.

STANDARD OF REVIEW

Summary judgment is appropriate if there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c). ACAT's claims that Defendants violated the CWA arise under the citizen suit provision of the CWA. *See* 33 U.S.C. § 1365(a)(1). No deference is afforded to agencies in citizen suit enforcement cases. Whether the

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be required to replace this general stormwater permit coverage with an individual stormwater permit. Rather, ACAT contends that the SCLF's non-stormwater coal discharges require Defendants to secure an additional, individual NPDES permit that would cover the direct discharges.

[5] Throughout the brief, all references will be made to the ECF bates stamp rather than the brief page (i.e. page 9 of 59 rather than the brief page 1 of 51) or document page number.

CWA's prohibition against unpermitted discharges applies to the discharges at issue here is wholly a question of statutory interpretation that does not fall within the special competence of regulatory agencies. *See Legal Envtl. Assistance Found. Inc. v. Hodel*, 586 F.Supp. 1163, 1169 (E.D.Tenn. 1984). Under the citizen suit provision, the Court is granted the authority to decide if a "discharge of a particular matter into a navigable water violates the CWA even though the regulating agency determined that the discharge was not subject to the requirement of a permit." *San Francisco Baykeeper v. Cargill Salt Div.*, 481 F.3d 700, 706 (9th Cir. 2007).

ARGUMENT

Defendants have mischaracterized ACAT's objectives in this litigation in an effort to draw attention away from the discharges themselves, and to provide an element of deference to EPA and DEC that does not exist. In fact, ACAT's primary objective – an order from this court directing Defendants to secure a permit under the CWA for their non-stormwater discharges of coal – is simple, straightforward and compelled by the law. Each of Defendants' arguments in support of their motion for summary judgment must fail because each is premised on a misreading of the law, applies an incorrect standard of review, or is not supported by the undisputed facts of this case.

I. The SCLF's Coal Discharges Are Not Permitted by Any Regulatory Authority.

A. The SCLF's General Stormwater Permit Does Not Shield Defendants from Liability for Non-Stormwater Discharges.

1. The General Stormwater Permit Does Not Authorize Non-Stormwater Discharges of Coal.

Contrary to Defendants' assertions, the Stormwater Permit does not authorize discharges of coal from the SCLF. *See* Def. MSJ at 25, 49, 55. The Stormwater Permit – the only NPDES permit authorizing any discharges at the SCLF – authorizes discharges of *stormwater* only, and does not authorize Defendants to discharge coal, coal dust, or non-stormwater containing coal, from the Facility into the Bay. *See* Ex. 1 to Pltffs. MSJ (Doc. 120-1) at 7-8 (MSGP section

1.1.3). EPA's regulations define stormwater as "storm water runoff, snow melt runoff, and surface runoff and drainage." 40 C.F.R. § 122.26(b)(13). Stormwater discharges associated with industrial activity are defined as "the discharge from any conveyance that is used for collecting and conveying storm water and that is directly related to manufacturing, processing or raw materials storage areas at an industrial plant." 40 C.F.R. § 122.26(b)(14).

The Stormwater Permit explicitly lists, on its face, the types of discharges that it authorizes. These discharges are solely limited to:

> 1.1.2.1 *Stormwater* discharges associated with industrial activity for any primary industrial activities and co-located industrial activities . . . ;
>
> 1.1.2.2 Discharges designated by EPA as needing a *stormwater* permit . . . ;
>
> 1.1.2.3 Discharges that are not otherwise required to obtain NPDES permit authorization but are commingled with discharges that are authorized under this permit;
>
> 1.1.2.4 Discharges subject to any of the national *stormwater-specific* effluent limitations guidelines listed in Table 1-1; and
>
> 1.1.2.5 Discharges subject to and New Source Performance Standards (NSPS) identified in Table 1-1.[6]

See Ex. 1 to Pltffs. MSJ (Doc. 120-1) at 6-7 (emphasis added). The Stormwater General Permit Factsheet further supports this limitation by stating

> *Non-Stormwater Discharges* (Part 2.1.2.10). Eliminate non-stormwater discharges that are not authorized by an NPDES permit. This limit is intended to reinforce the fact that, ***with the exception of the allowable non-stormwater discharges listed in Part 1.2.3***, (sic – Part 1.1.3) ***non-stormwater discharges are ineligible for coverage***, pursuant to Part 1.2.4.1.

Ex. 16 to Pltffs. MSJ (Doc. 120-16) at 50 (emphasis added). The Defendants' Stormwater Permit therefore explicitly limits its coverage to stormwater discharges, and excludes the non-stormwater discharges that ACAT challenges.

The Stormwater Permit authorizes a limited number of harmless non-stormwater

[6] It is uncontested that none of the discharges at SCLF are subject to any New Source Performance Standard.

discharges as exceptions to the general exclusion. Ex. 1 to Pltffs. MSJ (Doc. 120-1) at 7-8 (MSGP section 1.1.3). These authorized non-stormwater discharges are either discharges of water free of pollutants (*e.g.* "[p]otable water," "[u]ncontaminated condensate from air conditioners," "[r]outine external building washdown that does not use detergents"); or result from emergency situations unlikely to be repeated (*e.g.* "[d]ischarges from fire-fighting activities"). *Id*. None of these authorized non-stormwater discharges include direct discharges of coal or other pollutants from industrial activities. *Id.*

Defendants' Storm Water Pollution Prevention Plan ("SWPPP" or "Stormwater Plan"), in turn, also identifies a select number of authorized non-stormwater discharges. However, the identified non-stormwater discharges are only a subset of the authorized discharges identified in the Stormwater Permit. *See* Ex. 4 to Pltffs. MSJ (Doc. 120-4) at 23 (section 2.3). The Stormwater Plan specifically states that the only authorized non-stormwater discharges are from those generic harmless sources identified above, and that "[t]here are no unauthorized non-storm water discharges on site." *Id.* at 23 (section 3.10). Put simply, coal discharges are not included among the list of authorized discharges in the Stormwater Permit or Plan. *Id.* at 6-8 (sections 1.1.2 & 1.1.3).

CWA regulations make clear that non-stormwater discharges mixed with stormwater discharges must be covered under a separate NPDES permit. *See* 40 C.F.R. § 122.26(c)(1)(i)(C) (requiring that a stormwater permit applicant include a "certification that all outfalls that should contain storm water discharges associated with industrial activity have been tested or evaluated for the presence of non-storm water discharges *which are not covered by a NPDES permit*") (emphasis added); *see also Ecological Rights Found. v. Pac. Lumber Co*., 230 F.3d 1141, 1145 n.1 (9th Cir. 2000). The Stormwater Permit itself reiterates this limitation, stating that "[s]tormwater discharges that are mixed with non-stormwater, other than those non-stormwater discharges listed in Part 1.1.3, are not eligible for coverage under this permit" (Ex. 1 to Pltffs.

MSJ (Doc. 120-1) at 8 (MSGP section 1.1.4.1)), and that "[i]ndustrial materials do not need to be enclosed or covered if . . . discharges are authorized under another NPDES permit" *Id.* at 18 (MSGP section 2.1.2.1).

In addition to being contrary to the plain language of the MSGP, Defendants' assertion that CWA regulations provide DEC with authority to cover coal sediment within the General Permit is false. The regulatory provision that Defendants cite states that a general permit can cover "(i) Storm water point sources; ***or*** (ii) One or more categories or subcategories of point sources other than storm water point sources, or one or more categories or subcategories of 'treatment works treating domestic sewage.'" 40 C.F.R. § 122.28(a)(2) (emphasis added). A general permit cannot cover both stormwater and non-stormwater discharges. Furthermore, the regulation covering stormwater discharges from industrial facilities such as the SCLF states that dischargers "are required to apply for an individual permit or seek coverage under a promulgated *storm water general permit*." 40 C.F.R. § 122.26(c)(1).

Accordingly, the Stormwater Permit – on its face – makes clear that it only authorizes stormwater discharges.[7] The Stormwater Permit also makes clear that, to the extent a facility produces both stormwater and non-stormwater discharges, the non-stormwater discharges must be authorized under a separate NPDES permit. The only unauthorized discharges ACAT has alleged are non-stormwater discharges unrelated to any permitted stormwater discharge.

[7] Defendants rely upon a Second Circuit case, *Coon ex rel. Coon v. Willet Dairy, LP*, 536 F.3d 171 (2d Cir. 2008), to assert that they are shielded from this suit because they are acting in accordance with their permit. *See* Def. MSJ at 24 n.94. However, Defendants' reliance on *Coon ex rel. Coon*, is misplaced because that case dealt with a challenge against a dairy farm's discharges that were specifically authorized under the farm's general permit. *Coon ex rel. Coon*, 536 F.3d at 173. As discussed above, the discharges at issue in this suit are not "within what is permitted" (*See* Def. MSJ at 24) and, therefore, Defendants cannot be shielded from this legal challenge.

2. The General Stormwater Permit Does Not Provide A Shield for Non-Stormwater Discharges Because Those Discharges Were Not Within the Reasonable Contemplation of the Permitting Authority.

Defendants claim that their stormwater general permit shields them from liability for their other discharges. *See* Def. MSJ at 24-28, 49, 55-56. As explained above, Defendants' argument fails because the permit Defendants assert as a shield expressly prohibits "non-stormwater discharges" that are not otherwise expressly authorized by the permit. Ex. 16 to Pltffs. MSJ (Doc. 120-16) at 50; Ex. 1 to Pltffs. MSJ (Doc. 120-1) at 6-8 (MSGP sections 1.1.2, 1.1.3, 1.1.4). Defendants cannot point to any permit term authorizing the discharges Plaintiffs have alleged.

Defendants nevertheless insist that the non-stormwater discharges at issue in this case were within the "reasonable contemplation" of EPA when it granted Defendants notice of intent to be covered by the MSGP for their stormwater discharges, [8] and that therefore those non-stormwater discharges are implicitly authorized by the permit. This argument is not supported by the legal authority cited by Defendants and is contradicted by the clear language of the MSGP and the Stormwater Plan.

Defendants only rely on one decision, from the Fourth Circuit, to support their argument that section 402(k) of the Act (33 U.S.C. § 1342(k)) shields a discharger from liability for unpermitted non-stormwater discharges. *See* Def. MSJ at 27-28, 49. In *Piney Run Preservation Assoc. v. Cnty. Comm'rs of Carroll Cnty., Md.*, the court determined whether section 402(k) "bars suit against a permit holder for the discharge of pollutants not expressly listed in the permit," but capable of being included in the identified permit. 268 F.3d 255, 259 (4th Cir. 2001). In *Piney Run*, the pollutants listed in the permit ("dissolved oxygen and fecal coliform"), and the pollutant not listed in the permit and the subject of the plaintiff's action ("heat"), were all

[8] At the time EPA authorized the facility's stormwater discharges under the MSGP, EPA was responsible for implementing the NPDES program in Alaska. On October 31, 2009, the Alaska Department of Environmental Conservation received delegation from EPA under the CWA to implement stormwater permitting and enforcement. 73 Fed. Reg. 66243, 66244 (Nov. 7, 2008).

capable of coverage under a single NPDES permit. *See id*. at 269. The Fourth Circuit found that when a single NPDES permit authorizes the discharge of certain pollutants from specified outlets, and the permittee disclosed to the permitting authority the potential for discharge of additional pollutants from those same outlets, those additional pollutants were "reasonably anticipated by, or within the reasonable contemplation of" the permitting authority. *Id*. at 266-69. As a result, the discharger was not in violation of the terms of its NPDES permit for the discharge of those additional pollutants. *Id*.

Importantly, the *Piney Run* court did not hold, nor has any other court held, that disclosure of a discharge that is explicitly excluded from coverage under the existing permit, can be "reasonably anticipated by, or within the reasonable contemplation of" the permitting authority. The Fourth Circuit did, however, recognize that "[t]he central issue in determining the scope of a NPDES permit is whether the permit *implicitly incorporates pollutant discharges* disclosed by the permit holder to the permitting authority that are not explicitly allowed in the permit." *Id*. at 266 (emphasis added). Here, not only are the discharges at issue not "implicitly" allowed in the permit, the permit, on its face, expressly *precludes* authorization for those discharges. *See* Ex. 16 to Pltffs. MSJ (Doc. 120-16) at 50. EPA spoke clearly in the Stormwater Permit itself as to what types of discharges do *and do not* fall within the scope of the permit. Further, EPA has explicitly excluded authorization of the discharges at issue here. Consequently, there is no need to examine whether the permit "implicitly incorporated" these discharges. Defendants did not apply for, and do not have, a permit authorizing non-stormwater discharges of coal from the Facility. Accordingly, they cannot claim the protection of CWA section 402(k).

As discussed above, non-stormwater discharges were not within the "reasonable contemplation" of EPA because the structure and content of the MSGP and Stormwater Plan make clear that the only discharges capable of coverage under the MSGP are stormwater discharges. The Stormwater Permit is clear on its face that the only discharges it covers are

stormwater discharges (Ex. 1 to Pltffs. MSJ (Doc. 120-1) at 6-7 (MSGP section 1.1.2)), with the narrow exceptions that do not apply here. *See id.* at 7-8 (MSGP section 1.1.3). The *Piney Run* decision makes clear that the scope of the pollutant discharges under the contemplation of the permitting authority is limited to those "discharges disclosed by the permit holder to the permitting authority" that were not explicitly excluded by the permit. *See* 268 F.3d at 266. Here, the operator of the SCLF applied only for coverage under the stormwater permit, and therefore only disclosed the potential stormwater discharges. There is no evidence that EPA, or DEC, ever contemplated explicitly excluded non-stormwater discharges – coal – as being covered by the MSGP.

Any non-stormwater discharges from the facility not explicitly listed in the MSGP would need to be authorized under a separate NPDES permit. *See* 40 C.F.R. § 122.26(c)(1); Ex. 1 to Pltffs. MSJ (Doc. 120-1) at 8 and 18 (MSGP section 1.1.4.1 and 2.1.2.1). EPA was never asked by Defendants to authorize such discharges. It would have been unreasonable for EPA – when considering whether to authorize stormwater discharges from the SCLF – to assume that Defendants had sought authorization under the Stormwater Permit for non-stormwater discharges that are explicitly excluded from coverage by the Stormwater Permit on its face. It also would have been unreasonable for EPA to deny Defendants' application for coverage under the Stormwater Permit just because there was some potential for the SCLF to also discharge non-stormwater, given that both the CWA regulations and the Stormwater Permit contemplate that some permittees will require both a stormwater permit and a separate NPDES permit for non-stormwater discharges. *See* 40 C.F.R. § 122.26(c)(1); Ex. 1 to Pltffs. MSJ (Doc. 120-1) at 18 (MSGP section 2.1.2.1).

The claim by DEC Deputy Commissioner Kent that no "separate NPDES/APDES permit (general or individual), aside from the MSGP, was required for coal discharges or fugitive dust emissions" from the facility is unpersuasive. The Deputy Commissioner's claim cannot be

reconciled with the express terms of either the CWA regulations or the Stormwater Permit. *See* Declaration of Lynn J. Tomich Kent ("Kent Decl.") (Doc. 117) at ¶ 11. The CWA regulations require that non-stormwater discharges at an industrial facility will be covered by a separate NPDES permit. *See* 40 C.F.R. § 122.26(c)(1). The Stormwater Permit states that "[s]tormwater discharges that are mixed with non-stormwater, other than those non-stormwater discharges listed in Part 1.1.3, are not eligible for coverage under this permit" (Ex. 1 to Pltffs. MSJ (Doc. 120-1) at 8 (MSGP section 1.1.4.1)), and that "wastewaters must be covered under a separate NPDES permit [and] . . . . [i]ndustrial materials do not need to be enclosed or covered if . . . discharges are authorized under another NPDES permit" *Id.* at 18 (MSGP section 2.1.2.1).

To the extent that EPA provided Defendants with written notification authorizing use of the Stormwater Permit (Def. MSJ at 26 (citing EPA's April 9, 2009 letter to AES)), EPA was merely confirming that the facility continued to meet the requirements for coverage of its stormwater discharges under the Stormwater Permit. This confirmation requires, under section 1.1.4.3 of the Stormwater Permit, "written notification from EPA specifically allowing" coverage under the Stormwater Permit under certain circumstances. Ex. 1 to Pltffs. MSJ (Doc. 120-1) at 8. EPA's April 9, 2009 letter in no way altered the terms of the Stormwater Permit, or constituted a determination that the *only* CWA permit required for the Facility was a stormwater permit.

Finally, the Stormwater Permit expressly obligates Defendants to "eliminate non-stormwater discharges not authorized by an NPDES permit." Ex. 1 to Pltffs. MSJ (Doc. 120-1) at 20 (MSGP section 2.1.2.10). The Stormwater Permit also requires Defendants to take certain specified actions if they determine that "an unauthorized release or discharge (e.g., spill, leak, or discharge of non-stormwater not authorized by this or another NPDES permit) occurs at your facility." *Id.* at 23 (MSGP section 3.1). The Stormwater Permit presumes that authorized dischargers will comply with all of the requirements of the permit. *See id.* at 12 (MSGP section

1.2). Accordingly, to the extent that EPA was aware of any non-stormwater discharges from the facility at the time that it authorized coverage of the SCLF under the Stormwater Permit, EPA could reasonably have assumed that Defendants would comply with the Stormwater Permit and eliminate those non-stormwater discharges.

Defendants fail to otherwise establish that the specific discharges of coal from the conveyor system, shiploader, stacker/reclaimer, railcar unloader, coal stockpiles, or snow plows identified by ACAT are authorized by the express language of the MSGP or CWA regulations, or were otherwise within EPA's reasonable contemplation.

a. Non-stormwater Discharges from the Conveyor are Not Covered Under the Stormwater Permit or Stormwater Plan.

Defendants argue that because the Stormwater Plan identifies the conveyor and shiploader as potential sources of stormwater discharges, that other non-stormwater discharges from these sources must also be covered. *See* Def. MSJ at 25. This interpretation is directly contrary to the explicit language of the Stormwater Plan, which makes clear that the only discharges authorized from the conveyor and shiploader are stormwater discharges. Table 2 of the Stormwater Plan identifies "Drainage Area H" as including "[c]onveyor over water and shiploader." Ex. 4 to Pltffs. MSJ (Doc. 120-4) at 11. However, Table 2 is incorporated under section 1.7 which is titled "Storm Water Flow." *Id.* at 10. Table 2 further specifies that the nature of discharge from "Drainage Area H" is limited to instances where "[p]recipitation on covered conveyor falls into Bay." *Id.* at 11. In addition, the section of the Stormwater Plan describing the discharges anticipated from "Drainage Area H" states only that "Drainages D and H should have discharges during rain events. Drainage H does not have an outfall because it discharges via sheetflow off the conveyor." *Id.* at 14 (Stormwater Plan section 1.7.5). There is no discussion anywhere in the Stormwater Plan of non-stormwater discharges from the conveyor, shiploader, or "Drainage H" in general. In fact, the Stormwater Plan is quite clear that the only authorized

discharge associated with Drainage H is stormwater from precipitation falling on the conveyor and then into Resurrection Bay. Accordingly, the only discharges anticipated and authorized from the conveyor, shiploader, or Drainage Area H are stormwater discharges. Non-stormwater discharges from the conveyor and shiploader are simply not anticipated or authorized by the Stormwater Plan.

The Stormwater Plan also identifies the potential for spills or leaks from the dock and ship loader. *See id*. at 15 (section 2.2). However, as discussed above, the MSGP assumes that to the extent any spills or leaks occur, those will be isolated events that will trigger an immediate response from the permittee. *See id.* at 19-20 (section 3.4) and Ex. 1 to Pltffs. MSJ (Doc. 120-1) at 23 (MSGP section 3.1). Defendants cannot stretch this acknowledgment of isolated spill events as authorization for ongoing non-stormwater discharges from regular operation of the conveyor and shiploader.

The "Erosion and Sediment Controls" originally listed in the Stormwater Plan for the conveyor underscore that the only discharges from the conveyor contemplated under the Stormwater Plan are discharges during rain or other storm events. Those conveyor controls include a cover and a belt scraper. *See* Ex. 4 to Pltffs. MSJ (Doc. 120-4) at 15 (section 3.5.1). The cover is intended to keep precipitation from coming into contact with coal on the conveyor. Similarly, the scraper is intended to minimize the amount of precipitation-wetted coal from sticking to the conveyor as well as minimizing the amount of coal, and consequently total suspended solids ("TSS"), getting into the stormwater as the rain hits the conveyor and then falls into the Bay.

That the Stormwater Permit and Stormwater Plan do not authorize non-stormwater discharges of coal from the conveyor is underscored by sections 3.10 and 2.3 of the Stormwater Plan. It states that the only authorized non-stormwater discharges at the site are the generic non-stormwater discharges discussed above (potable water, discharges from fire fighting), and that

"[t]here are no unauthorized non-storm water discharges on site." *Id*. at 23 and 15-16 (sections 3.10 and 2.3).

Defendants fail to offer any additional evidence sufficient to show that EPA was aware of the potential for non-stormwater discharges from the conveyor. The only purported evidence offered by Defendants – references from two EPA reports from over a 25 year period – do not in fact show that EPA had knowledge of non-stormwater discharges of coal from the conveyor. *See* Def. MSJ at 28. A diver observing coal beneath the conveyor in 1987 could not have determined whether that coal originated from stormwater run-off or non-stormwater discharges. In fact, the diver's report shows that it was raining at the time of his dive inspection. *See* Ex. B, Part 2, to Ashbaugh Decl. (Doc. 121-4) at 5. Similarly, the EPA inspection report from the following year indicated only the potential for wet coal to fall from conveyor BC 13 onto the ground. The report explicitly states that such discharges "are unlikely beyond BC-13." *See* Ex. B, Part 1, to Ashbaugh Decl. (Doc. 121-3) at 3. Because BC 13 does not extend over the water, the report does not discuss or contemplate *any* discharges from the conveyor into the Bay. *See* Deposition of AES General Foreman Victor Stoltz ("Stoltz Depo.") (Doc. 125-1), Ex. 11 to Pltffs. MSJ at 26:6-9 (noting that BC 13 meets BC 14 on land in the vicinity of the control room; only BC 14 extends out over Resurrection Bay); *see* Ex CC to Declaration of Denise L. Ashbaugh in Support of Def's MSJ ("Ashbaugh Decl.") (Doc. 121-55) at 25 (SCLF aerial photo identifying BC 13 and BC 14).

b. Non-stormwater Discharges of Coal Dust from the SCLF are not Covered by the Stormwater Permit or Stormwater Plan.

Defendants assert that because coal dust is briefly mentioned in the Stormwater Permit and the Stormwater Plan, the permitting authority must have contemplated the potential for non-stormwater discharges of dust directly into the Bay. *See* Def. MSJ at 49-50. Defendants offer no support for this interpretation, and it is contrary to the plain language of the MSGP and the

Stormwater Plan. Furthermore, Defendants acknowledge that dust is only discussed in the MSGP and Stormwater Plan "because dust could migrate via stormwater" (Def. MSJ at 34), not out of any concern that the dust would reach Resurrection Bay directly, absent conveyance via stormwater. The discussion of dust in the MSGP is limited to one short sentence which states that "[y]ou must minimize generation of dust and off-site tracking of raw, final, or waste materials." Ex. 1 to Pltffs. MSJ (Doc. 120-1) at 21 (MSGP section 2.1.2.12). The MSGP does not in any way address the potential for coal dust discharges directly to a receiving water.

The discussion of coal dust in the Stormwater Plan is similarly brief, with the language under the heading "Dust Generation and Vehicle Tracking of Industrial Materials" stating only that "[t]he facility uses dust control sprinklers to suppress dust on the coal stockpiles. Dust suppression prevents off-site migration of coal dust." Ex. 4 to Pltffs. MSJ (Doc. 120-4) at 23 (section 3.12). Again, there is no discussion of any direct discharge of coal dust from the piles into the Bay or wetlands. The reference to "off-site migration of coal dust" is related to the "vehicle tracking of industrial materials" in the header and to the reference to "off-site tracking" of materials in the corresponding MSGP section. Accordingly, neither the Stormwater Permit nor the Stormwater Plan authorize direct discharges of coal dust from the piles, or demonstrate that such discharges were within the reasonable contemplation of EPA.

c. Non-stormwater Discharges from Snow Plowed into the Bay and other Waters are not Covered by the Stormwater Permit or Stormwater Plan.

As was the case with discharges from the conveyor and shiploader, Defendants claim that discharges from the dock are authorized by the MSGP, or were within the reasonable contemplation of the permitting authority and thus shielded from liability. *See* Def. MSJ at 55-56. As an initial matter, the section of the Stormwater Permit that Defendants claim covers discharges from the dock does not actually mention the dock at all. Defendants claim that the dock falls within "Drainage Area H" (Def. MSJ at 55), but the Stormwater Plan describes

"Drainage Area H" as including only the "[c]onveyor over water and shiploader." Ex. 4 to Pltffs. MSJ (Doc. 120-4) at 11 (Table 2). Even if the dock did fall within "Drainage Area H," Defendants' argument fails for the same reason that their conveyor argument fails: the only discharges from "Drainage Area H" disclosed in the Stormwater Plan were stormwater discharges during rain events. *See id.* at 10-11 and 14 (sections 1.7 and 1.7.5).

Defendants do not claim that any of the other discharges from snow plowing alleged by ACAT, including discharges into ponds and wetlands at or adjacent to the SCLF (*see* Complaint (Doc. 1) at ¶¶ 67-75), are covered by the Stormwater Permit or were within the reasonable contemplation of EPA.

d. The Stormwater Plan was not Available to EPA Prior to its Authorization of Defendants' Discharges Under the MSGP.

Finally, the Stormwater Plan was not available to EPA when it authorized the Facility's stormwater discharges. As Defendants point out, the Stormwater Plan was provided to EPA "[d]uring May, 2009," and "before coverage was effective" on June 14, 2009. *See* Def. MSJ at 26, 13. Defendants have not established that EPA had a copy of the Stormwater Plan, and contemplated its content prior to EPA approving permit coverage under the Stormwater Permit. *See* Ex. 92 to Pltffs. MSJ (Doc. 120-97). EPA's letter authorizing coverage under the MSGP does not mention the Stormwater Plan or its incorporation as part of the permit requirements. *Id.* In fact, the MSGP itself provides that the Stormwater Plan is subject to change depending on circumstances at the Facility:

> You must modify your SWPPP whenever necessary to address any of the triggering conditions for corrective action in Part 3.1 and to ensure that they do not reoccur, or to reflect changes implemented when a review following the triggering conditions in Part 3.2 indicates that changes to your control measures are necessary to meet the effluent limits in this permit. Changes to your SWPPP document must be made in accordance with the corrective action deadlines in Parts 3.3 and 3.4, and must be signed and dated in accordance with Appendix B, Subsection 11.

Ex. 1 to Pltffs. MSJ at 36 (Section 5.2).

Even if the contents of the Stormwater Plan were within the reasonable contemplation of EPA, nothing in the Stormwater Plan discloses the potential for the non-stormwater coal discharges identified by ACAT.

B. Plaintiffs Do Not Need to Exhaust Administrative Remedies Before Filing a Citizen Enforcement Action.

Defendants attempt to convert ACAT's citizen suit into an impermissible collateral attack on the Defendants' Stormwater Permit in order to invoke the doctrine of administrative exhaustion. *See* Def. MSJ at 30-31. First, this argument attempts to invoke a less vigorous standard of review that is deferential to agency decision-making. Second, Defendants' position is not supported by case law. Moreover, the doctrine of administrative exhaustion cannot trump a timely filed citizen suit.

Congress expressly authorized private parties to file suit under citizen suits without regard to whether they had participated in prior administrative proceedings. *See Citizens for a Better Env't v. Union Oil Co.,* 83 F.3d 1111, 1119 (9th Cir.1996) ("33 U.S.C. § 1365 makes no mention of exhaustion of state remedies as a prerequisite for bringing a citizen suit."); *see also McCarthy v. Madigan,* 503 U.S. 140, 144 (1992) ("[w]here Congress has not clearly required exhaustion, sound judicial discretion governs."); *Ass'n of Irritated Residents v. C & R Vanderham Dairy*, 435 F.Supp.2d 1078, 1083 (E.D.Cal. 2006) (no exhaustion requirement for citizen suit under the CAA). Environmental laws such as the CWA are routinely enforced through citizen suits, as regulators do not have the capacity to respond to every violation. As the Eleventh Circuit observed in *Atl. States Legal Found. v. Tyson Foods,* "citizen suits are an important supplement to government enforcement of the Clean Water Act, given that the government has only limited resources to bring its own enforcement actions." 897 F.2d 1128, 1136 (11th Cir. 1990). Indeed, "[b]oth the Congress and the courts of the United States have regarded citizen suits under the Act to be an integral part of its overall enforcement scheme." *Save Our Bays & Beaches v. City and Conty. of Honolulu*, 904 F.Supp. 1098, 1125 (D.Haw.

1994). Courts have found that "Congress' clear intention was . . . that citizen plaintiffs are not to be treated as 'nuisances or troublemakers' but rather as 'welcomed participants in the vindication of environmental interests.'" *Proffitt v. Mun. Auth. of the Borough of Morrisville*, 716 F.Supp. 837, 844 (E.D. Pa. 1989) (quoting *Friends of the Earth v. Carey*, 535 F.2d 165, 172 (2d Cir. 1976)). Moreover, "[c]itizen suits are a proven enforcement tool. They operate as Congress intended to both spur and supplement government actions. They have deterred violators and achieved significant compliance gains." *Id.* (quoting Rep. of the Sen. Comm. on Envt. and Public Works, S 99-50 at 27 (May 14, 1985)). The Ninth Circuit too has recognized that Congress intended citizen suits to be "handled liberally, because they perform an important public function." *Sierra Club v. Chevron U.S.A., Inc.,* 834 F.2d 1517, 1525 (9th Cir. 1987).

Defendants rely on *Amigos Bravos v. Molycorp, Inc*., a Tenth Circuit unpublished decision, to support their argument that citizens cannot collaterally challenge a permittee's discharge of pollutants through a citizen suit when they fail to participate in administrative permitting proceedings. *See* Def. MSJ at 30 *citing Amigos Bravos v. Molycorp, Inc.*, No. 97-2327, 1998 WL 792159,* 3-4 (10th Cir. 1998).[9] *Amigos Bravos* is inapplicable to this case for two key reasons. First, *Amigos Bravos* involved a collateral attack via citizen suit on the adequacy of a *renewed permit*. *See* 1998 WL 792159, *3-4 (holding that plaintiffs challenging a

[9] Defendants also maintain that ACAT must avail itself of all administrative remedies prior to bringing this lawsuit, including petitioning EPA to issue an individual NPDES permit. Def. MSJ at 30-31. Defendants again misconstrue the requirements imposed on a plaintiff bringing a citizen suit under the CWA, as well as the nature of ACAT's claims. ACAT had no obligation to object to "EPA's choice to permit this facility under the General Permit." *See id*. First, this is not a backdoor challenge to issuance of a General Permit for *stormwater* discharges. Second, the petition process, as Defendants acknowledge is purely discretionary. *See id. citing* 40 C.F.R. § 122.28(b)(3)(i) ("any interested party *may* petition") (emphasis added). Third, the authorization for coverage under stormwater general permits is not subject to public notice and comment, precluding the public and plaintiffs from any opportunity for participating at the administrative level when a particular discharger obtains coverage under the MSGP. *See* 40 C.F.R. §§ 124.10-11; *Santa Monica Baykeeper v. Kramer Metals, Inc.*, 619 F.Supp.2d 914, 923 (C.D. Cal. 2009).

permit renewal must follow the administrative procedures pursuant to 33 U.S.C. § 1369(b)(1)(F)). The present case, in contrast, is not a collateral attack. Plaintiffs are not challenging the adequacy of Defendants' Stormwater Permit. Rather, Plaintiffs challenge the unpermitted discharges of coal and coal dust from point sources within the SCLF.[10] Second, the citizens in *Amigos Bravos* submitted comments during the renewal process regarding the particular discharges at issue in the case. *See id.* at * 2-3. The EPA considered the comments and specifically determined that those discharges did not need to be regulated under the renewed permit. *See id.* Importantly, in this case, there was no opportunity for public comment on the particular coal discharges from the SCLF because the Defendants' stormwater discharges are authorized by the MSGP, which does not specifically address the coal non-stormwater discharges at issue in this case.[11] This is further illustrated and supported by the fact that the SCLF is covered under Sector AD, which is a miscellaneous sector that, in this case, merely includes benchmark requirements at SCLF for TSS, total iron and pH. Ex. 4 to Pltffs. MSJ at 56.

Moreover, the CWA's citizen suit provision only requires that plaintiffs submit a 60-day

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[10] It is important to distinguish between citizen suits that seek to require permits for particular discharges or challenge violations of an NPDES permit, and suits that challenge particular effluent limitations that the EPA or an appropriate state agency has established in the permit process. The latter kind of proceeding may implicate the administrative exhaustion doctrine. The first kind of proceeding, however, is not subject to the doctrine. *Nat'l Wildlife Federation v. Consumers Power Co.*, 657 F.Supp. 989, 1000 (W.D. Mich. 1987), *rev'd on other grounds*, 862 F.2d 580 (6th Cir. 1988).

[11] To obtain coverage under the MSGP for stormwater discharges, an operator is only required to submit a complete and accurate Notice of Intent for coverage under the MSGP and must develop a SWPPP according to the requirements of Part 5 of the MSGP. *See* MSGP Factsheet, Ex. 16 to Pltffs. MSJ (Doc. 120-16) at 29. This permitting process does not require DEC or EPA to solicit comments before authorizing coverage of the facility for stormwater discharges under the MSGP. Even if there was an opportunity for comment, the MSGP, by its own terms, is limited to authorizing stormwater discharges and, consequently, comments would be limited to concerns regarding stormwater discharges, not other discharges that have been specifically excluded under the MSGP. *See* 40 C.F.R. §§ 124.10-11; *Santa Monica Baykeeper*, 619 F.Supp.2d at 923 (C.D. Cal. 2009).

notice to the alleged violator and the EPA administrator prior to commencing suit in federal court. *See Ass'n of Irritated Residents*, 435 F.Supp.2d at 1083 (noting that "the doctrine of exhaustion cannot trump this remedy."); 33 U.S.C. 1365(b). The Third Circuit has stated that "[t]here is no room" for the argument that the doctrine of exhaustion of administrative remedies prevents a court from considering a timely filed citizen suit complaint." *Susquehanna Valley Alliance v. Three Mile Island*, 619 F.2d 231, 244 (3d Cir. 1980) ("[T]he district courts should defer for sixty days, and at that point determine whether or not the violation has been halted by administrative action or otherwise. If is it [sic] has been so halted, the citizens suit goes forward.").

Other courts, in this circuit and others, have determined that a 60-day notice provision serves the same purpose as the exhaustion doctrine and as such, compliance with these provisions satisfy any exhaustion requirements. *See e.g.*, *Communities For A Better Env't v. Cenco Refining Co.*, 180 F.Supp.2d 1062, 1086 (C.D.Cal. 2001) (citing *McKart v. United States*, 395 U.S. 185, 194-95 (1969) and *American Canoe Ass'n v. U.S. EPA*, 30 F.Supp.2d 908, 921-22, n.16 (E.D. Va. 1998)); and *Culbertson v. Coats American, Inc.*, 913 F. Supp. 1572, 1578 (N.D. Ga. 1995) (holding that a citizen suit under the CWA was not barred by the plaintiffs failure to participate in the administrative process).[12]

There is no dispute that ACAT provided the appropriate notice and waited the mandated 60 days prior to commencing this lawsuit. As a result, ACAT has exhausted the only required procedure prior to bringing this citizen suit. Thus, the doctrine of exhaustion "cannot trump" ACAT's ability to bring a citizen suit against Defendants for their unpermitted non-stormwater

[12] Notably, Defendants offer no support for their novel argument that the CWA requires a citizen to petition a regulator to compel an unpermitted discharger to obtain an individual NPDES permit as a prerequisite to the citizen bringing suit against the discharger under the Act. Def. MSJ at 30-31. There is no such requirement.

discharges. *Citizens for a Better Env't,* 83 F.3d at 1119; *Ass'n of Irritated Residents*, 435 F.Supp.2d at 1083.

C. This Court Owes No Deference to the Regulatory Agencies' Permitting Approach.

Defendants contend that the Court must defer to an agency's interpretation of the CWA, including the agency's decisions regarding how or whether to permit a discharge. *See* Def. MSJ at 29.[13] Defendants cite a litany of cases where courts have deferred to the agency's interpretation of an ambiguous permit provision. *See* Def. MSJ at 29, n.120. However, all of the cited cases involve the interpretation of a CWA permit provision, not whether a stormwater permit covers non-stormwater discharges.[14] These cases explain that a CWA permit is "a legally enforceable rule drafted by a regulatory agency" and is thus "akin to any agency regulation or rule, which a court would normally interpret." *See e.g.*, *Cal. Pub. Interest Research Group v. Shell Oil Co.*, 840 F.Supp. 712, 716 (N.D.Cal. 1993). As a result, in those cases, deference is afforded to the agency's interpretation of the particular provision in question.

However, in this case, Plaintiffs do not challenge the agencies' approach to *permitting stormwater discharges*. Importantly, Plaintiffs have *not* alleged (1) any violations of the

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[13] *Amicus*, National Mining Association, reiterates the same points as Defendants in its brief. *See* Brief of *Amicus Curiae* in Support of Defendants (Doc. 103-1) at 14 (Section III). For the reasons discussed in this section, the arguments of the *amicus* also lack merit.

[14] *See Russian River Watershed Prot. Comm. v. City of Santa Rosa*, 142 F.3d 1136, 1142 (9th Cir. 1998) (challenge to the method used by the City "to calculate compliance with the NPDES permits."); *Cal. Public Interest Research Group v. Shell Oil Co.*, 840 F.Supp. 712, 716 (N.D.Cal. 1993) (dispute over the meaning of an NPDES interim permit); *Natural Resources Def. Council, Inc. v. Texaco Refining & Marketing, Inc.*, 20 F.Supp.2d 700, 709 -710 (D.Del. 1998) (interpretation of an NPDES permit provision); *Student Pub. Interest Research Group of New Jersey, Inc. v. Hercules, Inc.*, 1986 WL 6380, 1 (D.N.J., Feb. 28, 1986) (case regarding the failure to comply with an NPDES permit.); *In re Freshwater Wetlands Protection Act Rules*, 798 A.2d 634, 636, 643 (N.J. Super. Ct. App. Div. 2002) (challenge to stringency of a new statewide general permit); *Minn. Ctr. for Envtl. Advocacy v. Minn. Pollution Control Agency*, 660 N.W.2d 427, 438 (Minn. Ct. App. 2003) (discussion of whether a general permit provision violates the rule requiring monitoring).

Defendants' Stormwater Permit, (2) that Defendants must have an individual permit for their stormwater discharges, rather than the general Stormwater Permit, or (3) that the general Stormwater Permit is arbitrary or unreasonable. *See* Def. MSJ at 29-30. Rather, this case is about the unpermitted non-stormwater discharges of coal and coal dust directly into Resurrection Bay. Because there is no permit provision in question for the court to interpret, no deference is afforded to the agencies. Thus, none of the case law cited by the Defendants is applicable.

Moreover, Defendants mislead the Court by erroneously asserting (1) that sediment discharges (i.e. non-stormwater) from the conveyor and shiploader are covered under the Stormwater Permit and (2) that both EPA and DEC recognize that these non-stormwater discharges are included in the general Stormwater Permit. Defendants fail to identify any authorizing document from EPA or DEC that acknowledges that non-stormwater discharges are covered under the Defendants' Stormwater Permit.[15] The only support Defendants rely upon for the assertion that DEC acknowledges that non-stormwater discharges are covered under the MSGP is the Kent Declaration attached in support of Defendants' Motion for Summary Judgment. *See* Def. MSJ at 29 n.121. The Kent Declaration states that

> current activities or facilities from which these discharges or emissions originate are regulated under the MGSP and described in the SWPPP. Based on a recent review of portions of the MSGP, I still believe that, for purposes of the NPDES/APDES program under the CWA, no other permit, other than the MSGP, is required.

Kent. Decl. (Doc. 117) at ¶ 11.

First, the Kent Declaration is not an enforceable part of any permit. In addition, for the reasons identified above in Section I.A., the coal discharges at issue in this suit are not covered

[15] Defendants cite to Ex. G of the Ashbaugh Decl. (Doc. 121-9) for this assertion. However, the April 6, 2009 letter from EPA only asserts that the facility is authorized to discharge stormwater under the MSGP as a Sector AD facility. Nowhere in the letter does EPA acknowledge or otherwise state that AES is authorized to discharge non-stormwater pursuant to the MSGP.

under the MSGP and this interpretation is, thus, contrary to the explicit authorization and language of the MSGP and cannot be afforded any deference.

Whether the CWA's prohibition against unpermitted discharges applies to the discharges at issue here is wholly a question of statutory interpretation that does not fall within the special competence of these agencies. *See Legal Envtl. Assistance Found., Inc.*, 586 F.Supp. at 1169; *O'Leary v. Moyer's Landfill, Inc.*, 523 F.Supp. 642, 647 (E.D.Pa. 1981); *see*, *also*, *Student Pub. Interest Research Group of New Jersey, Inc. v. Fritzsche, Dodge & Olcott, Inc.*, 579 F.Supp. 1528, 1537 (D.N.J. 1984) (noting the argument that "the doctrine of primary jurisdiction should be invoked sparingly where it would serve to preempt a citizen's suit"), *aff'd*, 759 F.2d 1131 (3d Cir. 1985). Consequently, this Court has the authority under the CWA to independently determine whether the Defendants' unpermitted non-stormwater coal discharges violate the Act, and under the standard of review in this case, should not give any deference to the agency's permitting approach.

D. ACAT's Claims for Injunctive Relief are not Moot Because the CWA NPDES Permitting Process Will Afford Relief Beyond the Measures Already Implemented at the SCLF.

Defendants argue that ACAT's claims are moot because there is no injunctive relief available beyond actions already taken by Defendants. *See* Def. MSJ at 32-33, 50-55. This argument ignores the relief offered by the well-established procedures for setting effluent limits in NPDES discharge permits under the CWA. An order from this Court requiring a non-stormwater NPDES permit would address Defendants' currently unauthorized coal discharges at the SCLF.

The CWA requires "that every permit contain (1) effluent limitations that reflect the pollution reduction achievable by using technologically practicable controls, and (2) any more stringent pollutant release limitations necessary for the waterway receiving the pollutant to meet 'water quality standards.'" *American Paper Inst. v. U.S. Envt'l Prot. Agency*, 996 F.2d 346, 349

(D.C. Cir. 1993) (citing 33 U.S.C. § 1311(b)(1)) (internal citations omitted). The water quality standards that every permit must ensure the receiving waterway will meet have two primary components:

> designated "uses" for a body of water (e.g., public water supply, recreation, agriculture) and a set of 'criteria' specifying the maximum concentration of pollutants that may be present in the water without impairing its suitability for designated uses. Criteria, in turn, come in two varieties: specific numeric limitations on the concentration of a specific pollutant in the water (e.g., no more than .05 milligrams of chromium per liter) or more general narrative statements applicable to a wide set of pollutants (e.g., no toxic pollutants in toxic amounts).

Id. at 349 (citing 33 U.S.C. § 1313(c)(2)(A)) (internal citations omitted).

The effluent limitations in the NPDES permit "must control all pollutants or pollutant parameters (either conventional, nonconventional, or toxic pollutants) which the [permitting authority] determines are or may be discharged at a level which will cause, have the reasonable potential to cause, or contribute to an excursion above any State water quality standard, including State narrative criteria for water quality." 40 C.F.R. § 122.44(d)(1)(i). Effluent limitations are defined as "any restriction established by a State or the Administrator on quantities, rates, and concentrations of chemical, physical, biological, and other constituents which are discharged from point sources into navigable waters, the waters of the contiguous zone, or the ocean, including schedules of compliance." 33 U.S.C. § 1362(11). In this way, "the rubber hits the road when the state-created standards are used as the basis for specific effluent limitations in NPDES permits." *American Paper Inst.*, 996 F.2d at 350.

Accordingly, ACAT seeks to have Defendants secure a new NPDES permit for its non-stormwater discharges of coal, in addition to its stormwater general permit, that contains effluent limitations capable of ensuring compliance with all applicable numeric and narrative water quality standards. The requirement that Defendants utilize control measures – some of which may already be in place, but have not been evaluated in the NPDES context – to reduce or eliminate their discharges does not render moot the CWA's requirement that all discharges be

specifically authorized by an NPDES permit containing effluent limitations. At most, the potential overlap in control measures only serves to show that the ultimate impact on Defendants should ACAT prevail will not be as burdensome or cataclysmic as Defendants and *Amicus* contend.

Defendants have not established that "best management practices (BMPs)" are the only effluent limitation that would be required under an NPDES permit for the SCLF's non-stormwater discharges. Although the CWA regulation for establishing effluent limitations does authorize the use of BMPs in certain limited situations, the use of BMPs is not necessarily to the exclusion of other applicable effluent limitations and technological requirements. *See* 40 C.F.R. § 122.44(k); *see also* 18 AAC 83.475. The regulatory process for issuing such a permit involves far more than determining appropriate control measures and requiring the permittee to install those controls. Defendants assert, but fail to prove, that other effluent limitations – including numeric effluent limitations – are unavailable or infeasible here and as a result, have failed to show how the existence of BMPs for the control of stormwater is the exact and only type of control on pollution that could result from an individual NPDES permit. Def. MSJ at 33, 52-53.

1. Discharges of Coal from the Conveyor and Shiploader.

Defendants claim that all of the control measures for the conveyor identified by ACAT's expert have already been implemented at the SCLF. *See* Def. MSJ at 32. This is demonstrably false. ACAT's expert identified multiple additional control measures and practices to address spillage from the conveyor, including: (1) installation of drip pans below the conveyors, including proper maintenance and operation of those drip pans; (2) replacing, repairing or installing seals/skirting along the edge of the conveyors to keep coal from falling off the conveyor; (3) replacing, repairing or installing scrapers on the conveyors to remove accumulated coal dust from the bottom; (4) fully enclosing all transfer points between conveyors and from the conveyor to the ship; (5) implementing housekeeping measures to clean coal dust or spillage in

pier areas above or near Resurrection Bay; (6) daily inspections of areas above or near Resurrection Bay; and (7) development of a spillage control plan to identify problem operations, required control measures, and monitoring procedures. *See* Klafka Report, Ex. JJ to Ashbaugh Decl. (Doc. 121-71 and 121-72) at 17-29.

There is no evidence that Defendants have taken any steps to implement many of these measures. For example, neither the original nor the modified Stormwater Plan – nor any other document – contains any mention of plans to install enclosures for all transfer points between conveyors, or from the conveyor to the ship. There is also no record of Defendants carrying out daily inspections of areas above or near Resurrection Bay.

In other cases, Defendants have failed to properly or completely implement the control measures. For example, although Defendants have installed some drip pans beneath some of the conveyors, there is no drip pan under conveyor BC 14 at the BC 14 transfer tower, and there are no drip pans for the ship loader conveyors. *See* Stoltz Depo., Ex. 11 to Pltffs. MSJ (Doc. 125-1) at 116:13-20 and 117:10-22. Furthermore, deposition testimony of Defendants' representatives establishes that the drip pans that have been installed are either not capable of eliminating discharges from the conveyors, or are not being maintained or operated effectively. *See* Pltffs. MSJ (Doc. 120) at 40 (section V.E.2.a) (Victor Stoltz acknowledged that coal has filled the pans above the drip pan edge and that when carryback coal is above the edge of the drip pan it can spill into Resurrection Bay).

2. Discharges of Coal Dust from the Conveyor Systems, Railcar Unloader, Stacker/Reclaimer, Bulldozers, Coal Piles and Shiploader.

Defendants claim that the dust control measures they were forced to implement under the Compliance Order that resulted from their violations of Alaska's clean air regulations are "comprehensive," and therefore that no additional controls are warranted. *See* Def. MSJ at 42. Defendants fail to acknowledge, however, that ACAT's expert identified numerous additional dust controls that would further reduce the SCLF's discharges of coal dust into the Bay.

While Defendants claim that ACAT's expert, Steven Klafka, acknowledged that the dust control measures currently in place at the SCLF are "comprehensive" (Def. MSJ at 50, n.206), Defendants fail to place this portion of the deposition testimony in its proper context. Defendants' counsel acknowledged that ACAT's expert described the coal dust control measures currently in place at the SCLF as representing only an "introductory level of effort." *See* Klafka Deposition excerpt, Ex. N to Ashbaugh Decl. (Doc. 121-26) at 71:18-20. Mr. Klafka went on to testify that "there's (sic) many additional measures that could be implemented." *Id*. at 71:21-22. Mr. Klafka later testified that certain of the dust control measures currently being implemented at the facility – including the fogging mechanisms and spray bars – are currently being implemented improperly. *Id.* at 138:16-25.

Among the additional dust control measures identified by Mr. Klafka in his expert report but currently absent from the SCLF are: development and implementation of a dust control plan, replacement and operation of conveyor transfer point baghouses, use of dust suppressant chemicals, expanded use of fogging and water cannons, enclosure of the coal stockpiles, construction of wind screens or enclosing walls for the coal stockpiles, reducing stockpile height, stopping operations at the SCLF during high winds before observations of visual dust, lengthening the train unloading building, limiting vehicle traffic and speeds, improved housekeeping to address accumulations of coal dust, monitoring of dust control measures, and use of air quality monitors between the facility and Resurrection Bay. *See* Klafka Report, Ex. JJ to Ashbaugh Decl. (Doc. 121-71 and 121-72) at 18-31. Defendants have provided no reason why all or some of these additional controls would not further reduce Defendants' generation of coal dust being discharged into Resurrection Bay. Neither have Defendants provided any reason why all or some of these additional controls would not be included among the effluent limitations in an NPDES permit for Defendants' non-stormwater discharges.[16] Further, by including of any of

[16] Defendants' reference to their payment of civil penalties under the Compliance Order for their

these additional control measures in the individual permit, they would become enforceable.[17] Moreover, an individual permit would be subject to public comment where the public may review, comment and recommend further control measures – a public process that is not available through agency authorization of general permits for individual dischargers. *See* 40 C.F.R. §§ 124.10-11; *Santa Monica Baykeeper*, 619 F.Supp.2d at 923.

3. Discharges of Coal from Snow Plowed into the Bay and Other Waters.

Defendants claim an AES policy forbids plowing snow from the dock into the Bay. *See* Def. MSJ at 57. This assertion is undermined by the deposition testimony of Defendants' representatives who acknowledged that coal falls onto the dock after shiploading, which occurs in winter as well as summer, and during snow removal, snow falls through the cracks in the dock and is discharged into the Bay. *See* Pltffs. MSJ at 45 *citing* to Ex. 90, Farnsworth Depo. (Doc. 125-3) at 113:3-114:6) (acknowledging that snow falls off the dock through slats into Resurrection Bay). Defendants do not claim to have any controls in place to prevent discharges

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air violations is irrelevant here. Def. MSJ at 51. The CWA makes clear that payment of civil penalties can only bar a citizen suit when those penalties were assessed under the Act itself. 33 U.S.C. § 1319(g)(6)(A). Because the civil penalties here were assessed under the Clean Air Act, they cannot preclude ACAT's CWA claims.

[17] The regulation of stormwater for industrial facilities under the MSGP is based on the "Standard Industrial Classification" ("SIC") the facility falls under. *See* 40 C.F.R. § 122.26(b)(i-x); *Natural Resources Defense Council, Inc. v. U.S. EPA*, 966 F.2d 1292, 1305 (9th Cir. 1992). The SCLF is regulated under Sector AD. *See* Ex. 4 to Pltffs. MSJ (Doc. 120-4) at 56-57. Sector AD is a catchall for the SIC classification and includes no specific requirements for stormwater discharges. *See* Ex. 1 to Pltffs. MSJ (Doc. 120-1) at 144, 203; *see also* Ex. 4 to Pltffs. MSJ (Doc. 120-4) at 22 and 56-57. While Defendants' Sector AD authorization includes "benchmarks" for effluents, benchmarks are not effluent limitations and are neither mandatory nor enforceable. *See* Ex. 1 to Pltffs. MSJ (Doc. 120-1) at 12 (section 1.2) and 40 (section 6.2.1); *Santa Monica Baykeeper*, 619 F.Supp.2d at 921-23 (noting that benchmarks are only for the use of the discharger to determine the overall effectiveness of the SWPPP and BMPs, rather than an effluent limitation, which is a mandatory enforceable restriction imposed by the agency). Consequently, there are no specific requirements for the SCLF's discharge of stormwater under the MSGP. Any effluent limitations set under an individual permit would be enforceable.

of coal-contaminated snow into the pond or wetlands north of the coal stockpiles.

II. Defendants are Liable for the Unpermitted Discharges of Coal from Conveyors and the Shiploader at the SCLF.

Defendants do not deny that they are discharging coal and coal materials from the conveyor and shiploader directly into the Bay outside of stormwater events. *See* Def. MSJ at 25; *see also* Pltffs. MSJ at 36-43 (section V.E.1-2). Accordingly, because those non-stormwater discharges are not authorized – explicitly or implicitly – by the MSGP or by any other act of a regulatory authority, Defendants are liable for these unpermitted discharges.

III. Defendants are Liable for the Unpermitted Discharges of Coal Dust from the SCLF.

A. Defendants Have a Duty to Secure an NPDES Permit Authorizing Discharges of Coal Dust into Resurrection Bay in Addition to any Regulation of Coal Dust Air Emissions under the Clean Air Act.

Defendants maintain that DEC's enforcement action and subsequent Compliance Order issued under the Clean Air Act ("CAA") render ACAT's citizen suit under the CWA moot. *See* Def. MSJ at 50-55.[18] According to Defendants, agency enforcement actions under the CAA eliminate any possible ongoing violations of the CWA and thus preclude a CWA citizen suit enforcement action. *See id*. This argument conflates three distinct issues, none of which actually support Defendants' argument. First, the mere fact that a pollutant is regulated under the CAA does not prevent regulation under the CWA. Second, enforcement action pursuant to the CAA does not satisfy the statutory requirements necessary to preclude a citizen suit under the CWA. Third, the plaintiffs must only prove the continuing likelihood of recurrent or sporadic violations.

1. Regulation of air emissions under the CAA does not preclude citizen enforcement under the CWA.

A citizen is precluded from bringing a citizen suit under the CWA in only two

[18] *Amicus*, National Mining Association, reiterates the same points as Defendants in its brief. *See* Brief of *Amicus Curiae* in Support of Defendants (Doc. 103-1) at 7-9 (Section I.a-b). For the reasons discussed in this section, *Amicus'* arguments also lack merit.

circumstances: (1) "prior to sixty days after the plaintiff has given notice of the alleged violation" and (2) "if the Administrator or State has commenced and is diligently prosecuting a civil or criminal action in a court of the United States, or a State to require compliance with the standard, limitation, or order." 33 U.S.C. § 1365(b)(1)(A)-(B). Contrary to this plain language, Defendants argue for a third precluding circumstance without citing any supporting case law. Defendants maintain that because coal dust emissions are regulated under the CAA, ACAT's claim under the CWA should be precluded. *See* Def. MSJ at 33-38, 50-55. This position has no support in the CWA, the CAA, or relevant case law.

In fact, the Second Circuit has addressed this specific issue of whether regulation under one statute precludes a citizen suit enforcement action under a separate equally applicable statute and determined that "each statute stands on its own, and means what it says." *See No Spray Coalition, Inc. v. City of New York*, 351 F.3d 602, 605 (2d Cir. 2003).

In *No Spray Coalition, Inc.*, the District Court for the Southern District of New York found that the spraying of certain pesticides substantially complied with FIFRA. *Id.* at 603. As such, the District Court refused to allow a citizen suit under the CWA to challenge alleged discharges of those chemicals into navigable waters without a permit. *Id.* The District Court reasoned that Congress "intended FIFRA as the primary scheme governing pesticide use" and that – when the use of a particular pesticide was challenged as a violation of the CWA – the primary scheme, FIFRA, should prevail. *Id.* The Second Circuit reversed and expressly rejected this reasoning, holding that there was "no basis" in the statute for such an interpretation because the CWA "authorizes 'any citizen' to bring suit to enforce its requirements." *Id.* at 604-06 ("[A] citizen suit seeking to enforce obligations created by CWA is expressly authorized.").

The Second Circuit's holding is consistent with the premise that the CWA and CAA each advances a distinct "societal interest" and that the "nature of the violative conduct under . . . CWA and CAA offenses [does] not represent essentially one composite harm." *U.S. v. Atl. States*

Cast Iron Pipe Co., 627 F.Supp.2d 180, 379 (D.N.J. 2009).[19] Because the goals of the CAA and CWA are different, compliance with the CAA cannot relieve obligations by Defendants to obtain requisite CWA permits.

2. Agency enforcement under the CAA does not preclude citizen suit enforcement under the CWA.

Defendants further contend that ACAT's enforcement action under the CWA is precluded because of a DEC enforcement action and subsequent Compliance Order under the CAA. *See* Def. MSJ at 50-55. This argument fails for two reasons. First, this argument is contrary to the plain language of the CWA and is not supported by any of the case law cited by Defendants. Second, administrative enforcement under one statute cannot preclude a citizen suit under a different statute, nor can administrative enforcement assessing penalties preclude a citizen suit seeking injunctive relief.

a. Administrative enforcement actions under one statute do not preclude citizen suits under a different statute.

The CWA broadly and expressly authorizes "any citizen" to bring an action to "enforce obligations" created by the Act. *No Spray Coalition*, 351 F.3d at 605. Defendants fail to cite a single case where an enforcement action under one statute precluded citizen enforcement of another statute. In fact, all of the cases cited by Defendants involved a government enforcement action *under the CWA* that precluded a citizen enforcement action *under the same Act*. *See* Def.

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[19] Courts have also found that other environmental statutes are similarly not mutually exclusive. *See*, *e.g.*, *Sierra Club v. Powellton Coal Co.*, 662 F.Supp.2d 514, 534 (S.D.W.Va. 2009) ("That 'violations of effluent limitations are subject to the comprehensive regulatory programs set forth in the CWA and the WVWPCA' is by itself of little moment. Congress intended that the provisions of SMCRA, and the state laws and regulations passed thereunder, be enforced. Simply because the provision sought to be enforced incorporates, in a consistent manner, standards imposed under the CWA does not mean that enforcement thereof will alter, or 'supercede[ ], amend[ ], modify [ ], or repeal[ ],' the CWA.") (internal citations omitted); *Middle Rio Grande Conservancy Dist. v. Babbitt*, 206 F.Supp.2d 1156, 1175-1176 (D.N.M. 2000) ("[U]nless the obligations of another statute are clearly mutually exclusive with the mandates of NEPA, the specific requirements of NEPA will remain in force.").

MSJ at 50, n.207. Significantly, these cases highlight the need for the government enforcement action to reasonably assure that "the violations alleged in the citizen suit" have ended and that they are not likely to reoccur prior to dismissing a case. *See* Def. MSJ at 50 n.207 *citing Envtl. Conservation Org. v. City of Dallas*, 529 F.3d 519, 531 (5th Cir. 2008) (EPA enforcement action adequately addressed the same violations in the citizen suit); *Atl. States Legal Found., Inc. v. Eastman Kodak*, Co., 933 F.2d 124, 125 (2d Cir. 1991) (if state settlement addressed the same violations alleged in the citizen suit then suit was precluded); *Comfort Lake Ass'n v. Dresel Contracting, Inc.*, 138 F.3d 351, 355 (8th Cir. 1998) (stipulation agreement addressed the same violations alleged in the complaint).

The violations alleged in this citizen suit are CWA violations. *See* Complaint (Doc. 1) at ¶¶ 1, 48-75. Specifically, ACAT alleges that coal dust is being discharged into Resurrection Bay from point sources within SCLF, which is a violation of the Section 301(a) of the CWA. *See* 33 U.S.C. § 1311(a). On the other hand, the DEC Compliance Order only addressed violations under the CAA. *See* Ex. 89 (Doc. 120-93) to Pltffs. MSJ at 7-8. In particular, the Compliance Order listed violations under 18 AAC 50.045(d) and 50.110, CAA regulations which solely addressed emissions of particulate matter into the air. *Id*. Thus, the Compliance Order only addressed CAA emissions and not CWA discharges. Moreover, the Compliance Order did not mandate zero coal discharges from the SCLF. *See* Def. MSJ at 52, n.215. As a result, the Compliance Order did not, and does not, prevent coal dust discharges into Resurrection Bay. Accordingly, the CWA violations alleged in ACAT's Complaint are not addressed by the Compliance Order.

b. Only judicial enforcement proceedings can preclude a citizen suit.

The DEC enforcement action and subsequent Compliance Order are administrative actions under the CAA that cannot preclude ACAT's citizen suit under the CWA. There are two separate jurisdiction-stripping provisions in the CWA that could preclude the present citizen suit

because of enforcement action by a State or administrative agency. 33 U.S.C. § 1365(b)(1)(B) prevents a citizen suit if the agency or State "has commenced and is diligently prosecuting a civil or criminal action" in court. This provision only applies if the State or agency initiates judicial proceedings before the citizen plaintiff. *See Paper, Allied-Indus., Chemical and Energy Workers Intern. Union v. Cont'l Carbon Co.*, 428 F.3d 1285, 1298 (10th Cir. 2005) ("Section 1365(b)(1)(B) precludes *any* civil actions when a state initiates *judicial proceedings* against a polluter.") (emphasis in original); *Sierra Club v. Chevron U.S.A., Inc.*, 834 F.2d 1517, 1525 (9th Cir. 1987) ("[A] citizen enforcement suit is not precluded by nonjudicial enforcement.").

However, when the agency "does something less than judicial enforcement, such as enter into a consent order," then § 1319(g)(6)(A) applies, which only "excludes civil penalties from the scope of permissible private enforcement remedies, but does not preclude other equitable relief." *Cont'l Carbon Co*., 428 F.3d at 1298.[20] In which case, the citizen suit can still proceed. *Wash. Pub. Interest Research Grp. v. Pendleton Woolen Mills*, 11 F.3d 883, 886-87 (9th Cir. 1993) (citizen suit not barred by administrative compliance order.). However, the limitations imposed by § 1319(g)(6)(A) do not apply if the citizen suit was commenced prior to the administrative action. 33 U.S.C. § 1319(g)(6)(B)(i).

The DEC enforcement action and Compliance Order is an administrative action. Without a judicial proceeding by either the State or agency, the Defendants can only invoke § 1319(g)(6)(A) to exclude civil penalties from the scope of permissible private enforcement remedies. However, Defendants cannot seek exclusion of penalties in this case because

[20] The Court noted that "[w]hat results from these statutes is a two-tiered claim preclusion scheme. The broadest preclusion exists when a state commences and diligently prosecutes a court action to enforce the standard. If this happens, § 1365 indicates that 'no action' may be commenced by a private person. A narrower preclusion exists when the state does something less than judicial enforcement, such as enter into a consent order. All that is available to a defendant in those cases is § 1319(g)(6)(A)(ii), which specifically excludes civil penalties from the scope of permissible private enforcement remedies, but does not preclude other equitable relief." *Cont'l Carbon Co*., 428 F.3d at 1298.

Plaintiffs' citizen suit was commenced prior to the administrative action. *Cf.* Complaint (Doc. 1) (filed Dec. 28, 2009) and Compliance Order, Ex. 89 (Doc. 120-93) to Pltffs. MSJ at 30 (compliance order signed by DEC on May 3, 2010). Consequently, the Compliance Order in no way bars this action.

Moreover, Defendants fail to cite any of the applicable statutory provisions in their brief regarding preclusion of citizen suits; instead only vaguely relying on case law that discusses the standard for preclusion under § 1365(b)(1)(B). *See* Def. MSJ at 50-51. In both *City of Dallas* and *Atl. States Legal Found.,* there was an agency judicial proceeding that resulted in a consent decree or settlement.[21] In these two cases, the filing of an enforcement action in court triggered § 1365(b)(1)(B). Even *Comfort Lake Association*, which addresses § 1319(g)(6)(A), held that "an administrative enforcement agreement between EPA or [the State agency] and the polluter will preclude a pending citizen suit claim for *civil penalties*." 138 F.3d at 357 (emphasis added).

In this case, DEC's administrative proceedings under the CAA do not preclude this citizen suit. This case was brought prior to the signing of the Compliance Order, and even if it provided some preclusive effect, the Compliance Order only addresses CAA violations. In addition, the Compliance Order and assessment of penalties was not pursuant to the CWA.

3. Regulation and enforcement under the CAA did not, and do not, prevent ongoing violations of the CWA.

Defendants maintain that in light of the Compliance Order, ACAT cannot establish a "realistic prospect" of future CWA violations. *See* Def. MSJ at 50-55. First, whether there is a "realistic prospect" of future violations is not the appropriate standard to determine the presence of on-going violations under the CWA. Second, it is uncontested that the SCLF cannot prevent

[21] *City of Dallas*, 529 F.3d at 523 ("In May 2006, the EPA, joined by the State of Texas, filed a CWA enforcement action against the City in federal district court."); *Atl. States Legal Found., Inc*, 933 F.2d at 126-27 (Kodak "entered into a criminal plea agreement with state authorities pursuant to which it pleaded guilty to a two-count misdemeanor complaint in Rochester City Court.").

sporadic future discharges of coal and coal dust into Resurrection Bay. Because Defendants concede that the Facility cannot operate without creating coal dust that is discharged into Resurrection Bay, there is unquestionably a continuing likelihood of recurrence of intermittent CWA violations. Consequently, ACAT's claims are not moot.

Contrary to Defendants' assertion, the standard for determining the presence of on-going violations is not a question of first impression in this Circuit. *See* Def. MSJ at 50 n.207. The Ninth Circuit does not apply, nor should it adopt, a "realistic prospect" test in this case. *Id*. This Circuit has held that "[i]ntermittent or sporadic violations do not cease to be ongoing until the date when there is no real likelihood of repetition." *Sierra Club v. Union Oil Co. of Cal.*, 853 F.2d 667, 670 (9th Cir. 1988). Thus, in the Ninth Circuit, a plaintiff may establish ongoing violations under the CWA in one of two ways: (1) prove violations "that continue on or after the date the complaint is filed;" or (2) produce evidence of "a continuing likelihood of a recurrence in intermittent or sporadic violations." *See Cmty. Ass'n for Restoration of the Env't v. Henry Bosma Dairy*, 305 F.3d 943, 953 (9th Cir. 2002). This is the appropriate standard for this CWA citizen suit.

There is a continuing likelihood of recurring intermittent or sporadic CWA violations because, as Defendants admit, operating the SCLF creates coal dust that "will continue to settle into Resurrection Bay." *See* Declaration of Kirk Winges ("Winges Decl.") (Doc. 119-1) at 5 (*see also id*. at 10 (noting that it is not possible to eliminate coal dust from entering Resurrection Bay)). Throughout Defendants' brief, they emphasize the impossibility of imposing a zero emission standard on a coal loading facility. *See* Def. MSJ at 14, 36 n.153, 50-55. Defendants highlight CAA regulations that only require "reasonable precautions" and that do not mandate zero emissions from the facility. *See* Def. MSJ at 14, 52; *see also* 18 AAC 50.045(d); Winges Decl. at 5 and 10. While the CAA may not require zero emissions, the CWA strictly prohibits any discharge *without a permit*. 33 U.S.C. § 1311(a); *see*, *e.g.*, *Save Our Bays and Beaches*, 904

F.Supp. at 1105 ("The Act does not allow for 'de minimis' or 'rare' permit violations. . . "). As a result, it is irrelevant that the SCLF has "made huge strides" to reach zero emissions. *See* Def. MSJ at 52 n.215. As long as the SCLF continues to operate with coal discharges into Resurrection Bay (discharges that Defendants do not dispute will enter Resurrection Bay) there is a reasonable likelihood of continuing intermittent or sporadic violations.[22] Consequently, ACAT's claims are not moot.

B. The Court Should Not Accord Deference for Agency Inaction or Failure to Regulate Unpermitted Discharges of Coal Dust into Resurrection Bay.

Defendants urge this Court to defer to EPA's and DEC's failure to require an NPDES permit for non-stormwater coal dust discharges at the SCLF.[23] *See* Def. MSJ at 38-39.[24] Veiled in references to deference, Defendants essentially argue that a private party cannot maintain a CWA citizen suit for unpermitted discharges when the agency has determined that such a permit is not required. This argument is another attempt to apply a standard of review that does not

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[22] *See Save Our Bays and Beaches*, 904 F. Supp at 1118 (finding ongoing violations were reasonably likely to continue based on the fact that Defendants could not "completely eradicate the risk" of future violations).

[23] Importantly, there have been no agency findings that provide an official agency interpretation of the CWA that assert that the coal discharges in this case are not regulated under the CWA. Instead, Defendants only offer the Kent Decl. *See* Kent Decl. (Doc. 117) at 1. Ms. Kent first states that "ADEC generally does not regulate emissions to air under its Clean Water Act authority …." *Id*. at 7. However, this statement provides no indication of what DEC would do if coal dust "entered" Resurrection Bay. ACAT's claim does not pertain to "air emissions" but rather to discharges, which are regulated under the CWA. Second, Ms. Kent states that she does "not believe that a separate NPDES/APDES permit … was required … because the current activities or facilities from which these discharges or emissions originate are regulated under the MSGP and described in the SWPPP." *Id*. at 11. However, again, this is not a formal decision by the agency or part of the permit that discharges of coal dust into waters of the U.S. are or are not regulated under the CWA. Furthermore, whether the Facility is regulated for stormwater discharges under the MSGP is wholly irrelevant to whether non-stormwater discharges are taking place and subject to regulation under the Act.

[24] *Amicus*, National Mining Association, reiterates the same points as Defendants in its brief. *See* Brief of *Amicus Curiae* in Support of Defendants (Doc. 103-1) at 14 (Section III). For the reasons discussed in this section, *Amicus'* arguments also lack merit.

apply in this case. As the Ninth Circuit has already recognized, this "argument must be rejected because it runs squarely against the plain words of the statute and would frustrate the purpose of the Clean Water Act's empowerment of citizen suit[s]." *Ass'n to Protect Hammersley, Eld, and Totten Inlets v. Taylor Resources, Inc.*, 299 F.3d 1007, 1011-12 (9th Cir. 2002).

To begin with, the CWA does not grant to EPA and DEC the exclusive authority to determine if the discharge of a pollutant into a navigable water violates the Act. *See Taylor Resources*, 299 F.3d at 1012 (citing *Sierra Club v. Cedar Point Oil Co.*, 73 F.3d 546, 566-67 (5th Cir. 1996)). Under the citizen suit provision, the Court is also granted the authority to decide if a "discharge of a particular matter into a navigable water violates the CWA even though the regulating agency determined that the discharge was not subject to the requirement of a permit." *San Francisco Baykeeper*, 481 F.3d at 706. As a result, a citizen suit alleging unpermitted discharges is not challenging the agency's understanding of a very complex statute. Rather, such a suit is merely invoking the Court's independent authority under the Act to hold that a particular discharge is a violation.

Additionally, EPA and DEC inaction is not a barrier to ACAT's citizen suit. As the Ninth Circuit explained in *San Francisco Baykeeper*, "[i]f the decision of the EPA is given conclusive deference, the citizen suit would be defeated. Suit is therefore allowed despite EPA's inaction." *Id.* at 706. Indeed, there "is no authorization to block a citizen's suit . . . even though the agency believes that the suit should not go forward." *Marathon Oil Co. v. E.P.A.*, 564 F.2d 1253, 1273(9th Cir. 1977) (citing *Bethlehem Steel Corp. v. Train*, 544 F.2d 657, 660 (3d Cir. 1976)). The EPA and DEC "may choose to sit on the sidelines, but [their] inaction is not a barrier to a citizen's otherwise proper federal suit to enforce the Clean Water Act." *Taylor Resources, Inc.*, 299 F.3d at 1013.

C. The Sources of Coal Dust at the SCLF are Point Sources as Defined Under the CWA.

The CWA requires a permit for any discharge of a pollutant from a point source, and defines "point source" as "any discernible, confined and discrete conveyance." 33 U.S.C. § 1362(14); *see also* 40 C.F.R. § 122.2. Coal dust is conveyed from several "discernible, confined and discrete" conveyance locations within the SCLF, including the stacker/reclaimer, the railcar unloader, the conveyor system, the ship loader, stockpiles and bulldozers.[25] The issue before this Court is whether these sources at the SCLF are point sources under the Act that directly discharge coal dust into Resurrection Bay.[26] Defendants attempt to obscure this rather basic question by suggesting that stormwater case law, which only applies to rain and snow run-off, is somehow applicable to the issue of defining a point source in general. *See* Def. MSJ at 39-42. Defendants make several unavailing arguments that boil down to the unsupportable claim that simply because coal is carried by wind from these point sources to the Bay, these components of the SCLF cannot be considered point sources under the Act.[27]

1. Channelization, as an element in establishing point sources, is only used in determining whether stormwater run-off is a point source.

Defendants devote a significant portion of their brief exploring the intricacies of when stormwater run-off is considered a point source under the CWA. *See* Def. MSJ at 39-47. While it has been a significant question for EPA, it is not relevant to the question before this Court. At the outset, the Defendants reliance on stormwater run-off case law is misleading because of the

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[25] *See Borden Ranch Partnership v. U.S. Army Corps of Engineers*, 261 F.3d 810, 815 (9th Cir. 2001) (bulldozers and backhoes constitute point sources)

[26] Under the CWA, the"definition of a point source is to be broadly interpreted" and "embrac[es] the broadest possible definition of any *identifiable conveyance from which pollutants might enter waters* of the United States." *Cordiano v. Metacon Gun Club, Inc.*, 575 F.3d 199, 219 (2d Cir. 2009) (emphasis added).

[27] *Amicus*, National Mining Association, reiterates the same points as Defendants in its brief. *See* Brief of *Amicus Curiae* in Support of Defendants (Doc. 103-1) at 9-12 (Section I.c). For the reasons discussed in this section, *Amicus'* arguments also lack merit.

unique nature of stormwater.[28] In fact, channelization – an element Defendants maintain is lacking in the discharge of coal dust from the SCLF into Resurrection Bay – is only required for the determination of whether stormwater run-off is a point source. Moreover, reliance on stormwater run-off point source cases is entirely unhelpful because there is relevant, directly applicable case law that addresses the precise question before this Court.

a. Channelization is only required to establish stormwater run-off as a point source.

By relying upon stormwater point source case law, Defendants' disregard the difference between stormwater run-off and a direct discharge of a pollutant. This distinction is critical because stormwater "runoff is not inherently a nonpoint or point source of pollution." *Nw. Envtl. Def. Ctr. v. Brown*, 640 F.3d 1063, 1071 (9th Cir. 2011). Rather, defining the status of stormwater runoff depends on "whether it is allowed to run off naturally (and is thus a nonpoint source) or is collected, channeled, and discharged through a system of ditches, culverts, channels, and similar conveyances (and is thus a point source discharge.)" *Id.* This analysis helps the court determine if runoff can be "traced to any identifiable point of discharge" and therefore subject to NPDES regulation. *See Trustees for Alaska v. EPA*, 749 F.2d 549, 558 (9th Cir. 1984). However, the direct discharge of a recognized pollutant from an established point source such as those at issue here is inherently a discharge from a "discernible, confined and discrete conveyance."[29] *See* 33 U.S.C. § 1362 (14). No additional analysis is needed because a direct discharge can easily be traced to a single identifiable source.

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[28] "Stormwater that is not collected or channeled and then discharged, but rather runs off and dissipates in a natural and unimpeded manner, is not a discharge from a point source as defined by § 502(14)." *Nw. Envtl. Def. Ctr. v. Brown*, 640 F.3d 1063, 1070 (9th Cir. 2011) *citing League of Wilderness Defenders v. Forsgren,* 309 F.3d 1181, 1184 (9th Cir.2002).

[29] The Second Circuit in *Cordiano v. Metacon Gun Club, Inc.*, explained that runoff and a direct discharge are two separate point source discharges, both of which are actionable under the CWA. 575 F.3d 199, 223 (2d Cir. 2009) (citing *Concerned Area Residents for the Environment v. Southview Farm*, 34 F.3d 114 (2d Cir. 1994). The Court explained that "liquid manure that

Defendants provide a misleading interpretation for the Court by relying on cases determining whether or not stormwater run-off was from a point-source to assert that the stacker/reclaimer, the railcar unloader, the coal stockpiles, the conveyor system transfer points, the ship/loader conveyors and chute, and bulldozers plowing coal in the stockpile are not point sources. These points where dust is created are all specific, discernible locations. The stormwater run-off cases, on the other hand, focus on whether stormwater (a typical non-point source pollutant) is conveyed through channels or ditches because the run-off originates from precipitation – a natural event. Such a determination is necessary in those run-off cases because courts and regulators have been reluctant to hold individuals liable for the effects of purely natural events (i.e., stormwater run-off where there is no effort to convey that run-off through channels or ditches). Such a determination is not necessary in this case, however, because all of the coal dust discharges originate directly from human activities at the SCLF.

For example, the operation of the bucket wheel on the stacker/reclaimer creates coal dust. *See* Pltffs. MSJ (Doc. 120) at 23 *citing* Exs. 9, 21-22, 24. The operation of unloading railcars and dumping coal onto the conveyor system creates coal dust. *See id. citing* Exs. 9 and 21. The operation of moving coal from one conveyor to another creates coal dust. *See id. citing* Exs. 9, 21-22, 24, 93. The operation of dumping coal down the coal chute on the ship loader into vessels creates coal dust. *See id. citing* Ex. 93. These points of origination of coal dust are all readily identifiable. Because the Court is not evaluating rain falling from the sky and landing on the SCLF and then attempting to discern whether that classic non-point source[30] becomes a point

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flowed from the field of a farm to a jurisdiction water constituted a discharge from two point sources: (1) a swale coupled with a pipe that channeled the manure and (2) manure-spreading vehicles that discharge manure onto the field." *Id*. While the swale collected manure runoff and channeled it into a nearby stream, the "manure spreading vehicles themselves were point sources" because the "collection of liquid manure into tankers and their discharge on fields from *which the manure directly flows into navigable waters* are point source discharges under the case law." *Id*. (emphasis in original).

[30] The Ninth Circuit has noted that "Congress ha[s] classified nonpoint source pollution as *runoff*

source through "channelization," the Court need not consider "channelization" as Defendants contend. In this case, because the point at which the pollutant originates is clearly identifiable, it is irrelevant that the pollutant – coal dust – does not travel in a channel or ditch between the point source and waters of the U.S., ACAT has made the only required showing by identifying the sources of the pollutant discharges. Because Defendants ignore this distinction between stormwater run-off and direct discharges, their contention that channelization is required to establish a point source is misguided and irrelevant to the case at hand, as this case does not involve the question of whether stormwater discharges are from a point source.

Defendants emphasize that defining a point source depends on whether pollutants are conveyed by natural forces or by "artificial forces or pathways that channel a pollutant stream." *See* Def. MSJ at 40. In support of this argument, Defendants rely solely on cases involving stormwater run-off.[31] Defendants have not presented a single case where a court has held that a

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caused primarily by rainfall around activities that employ or create pollutants. Such *runoff* could not be traced to any identifiable point of discharge." *Oregon Natural Desert Ass'n v. Dombeck*, 172 F.3d 1092, 1098 (9th Cir. 1998) (emphasis added) citing *Trustees for Alaska v. EPA*, 749 F.2d 549, 558 (9th Cir. 1984); *see also U.S. v. Earth Sciences, Inc.*, 599 F.2d 368, 373 (10th Cir. 1979) (reasoning that non-point sources of pollution "are virtually impossible to isolate to one polluter" and that "it contravenes the intent of [CWA] and the structure of the statute to exempt from regulation any activity that emits pollution from an identifiable point"). EPA is quite clear that non-point source pollution is pollution that "[i]n practical terms, *does not result from a discharge at a specific, single location (such as a pile)* but generally results from land runoff, precipitation, atmospheric deposition or percolation." EPA Office of Water, *Nonpoint Source Guidance* 3, 5 (1987) (emphasis added).

[31] *See* Def. MSJ at 39-41 *citing Trustees for Alaska*, 749 F.2d at 558 (discussing when runoff becomes a point source); *Nw. Envtl. Def. Ctr.*, 640 F.3d at 1071 (whether stormwater discharge from logging roads is a point source); *Cordiano*, 575 F.3d at 221 (questioning whether surface runoff is a point source.); *Appalachian Power Co. v. Train*, 545 F.2d 1351, 1373 (4th Cir. 1976) (whether rainfall runoff is a point souce); *Envtl. Def. Ctr., Inc. v. EPA*, 344 F.3d 832, 841-42 n.8 (9th Cir. 2003) (whether storm sewers and stormwater runoff are point sources); *Greater Yellowstone Coal. v. Lewis*, 628 F.3d 1143, 1152-53 (9th Cir. 2010) (whether potential for runoff at a mine site is a point source); *Envtl. Prot. Info. Ctr. v. Pac. Lumber Co.*, 469 F. Supp. 2d 803, 821 (N.D. Cal. 2007) (whether stormwater runoff from logging roads is a point source); *Driscoll v. Adams*, 181 F.3d 1285 (11th Cir. 1999) (whether the discharge of stormwater during timber harvesting is a point source); *Ecological Rights Foundation v. Pacific Gas and Electric Co.*, 803

direct discharge from a point source requires additional "channelization" by artificial sources to fall within CWA jurisdiction.

Even *Cordiano v. Metacon Gun Club*, which the Defendants rely on to state that windblown dust must be "channelized" to constitute a point source, does not support this broad assertion. *See* Def. MSJ at 44. In fact, the finding in *Cordiano* that lead dust from an earthen berm was not a point source was a factual determination, not a legal conclusion. *Cordiano*, 575 F.3d at, 222-24 ("[T]here is no evidence that lead deposited into the berm directly flows into . . . wetlands."). The Second Circuit was clear that its holding was not "that a berm can never constitute a point source, but only that there is insufficient evidence" for such a conclusion in that case. *Id*. at 224. Moreover, the court in *Cordiano* recognized that the discharge of a pollutant directly into navigable waters from a point source was different than channelized run-off. *Id.* at 223. The court explained that vehicles, which directly discharged pollutants, were point sources "themselves" regardless of channelization. *Id.* (*citing Concerned Area Residents for the Environment v. Southview Farm*, 34 F.3d 114 (2d Cir. 1994)).

Courts have only found it necessary to identify a "channel" between a point source and waters of the U.S. when they have been tasked with determining whether stormwater run-off should be regulated as a point source. For cases such as this one, or the pesticide application cases, where pollutants come from a readily identifiable source and fall into waters of the U.S., the determination of whether the pollutant is channeled is not necessary. Simply because a pollutant falls through the air before reaching the receiving water – and thus its flight could be considered a "natural" or "unchannelized" conveyance – does not render the original source of the pollutant not a point source.

F. Supp. 2d 1056 (N.D. Cal. 2011) (whether stormwater runoff from utility poles is a point source).

b. Dispersion of a pollutant from a readily identifiable source, through the air, into waters of the U.S. requires a CWA permit.

Defendants' reliance on requirements to establish stormwater run-off as a point source is equally misplaced and misleading because there is CWA point source case law that addresses the specific issue in this case: whether the direct discharge of a pollutant into the air from a point source, which ultimately lands on a navigable water, is a violation of the CWA. As relied upon in ACAT's opening brief (*see* Pltffs. MSJ at 32-35), there are three cases that found this type of direct non-stormwater discharge to violate the CWA: (1) *League of Wilderness Defenders v. Forsgren*,[32] (2) *Peconic Baykeeper, Inc. v. Suffolk Cnty.*,[33] and (3) *No Spray Coalition v. City of New York*.[34] All three of these cases involved the discharge of pesticides, a pollutant, from an aircraft, a point source, into the air over a large area of land that ultimately settled on a navigable water.[35] Defendants dismiss the importance of these three cases by arguing that the court in each case required both channelization of the pollutant and a discharge directly over a water body in order to find that permit authorization was required under the CWA. *See* Def. MSJ at 43-44. This is simply incorrect.

Channelization is never discussed or mentioned, let alone required for the holding in any of these three cases. In fact, the court in each case was never concerned with whether the pollutant was dispersed into the air between the point source (the nozzle on the plane or helicopter) and the point at which it reached waters of the U.S. In *League of Wilderness Defenders,* the Ninth Circuit resolved the issue of whether aircraft were point sources quickly

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[32] 309 F.3d 1181 (9th Cir. 2002).
[33] 600 F.3d 180 (2d Cir. 2010).
[34] 2005 WL 1354041 (S.D.N.Y. June 8, 2005).
[35] *League of Wilderness Defenders*, 309 F.3d at 1192-93 ("We hold that the aerial spraying of pesticide conducted by the Forest Service is point source pollution and requires [a] NPDES permit."); *Peconic Baykeeper, Inc.*, 600 F.3d at 188-89 (spraying of pesticides from aircraft is a discharge from a point source.); *No Spray Coalition*, 2005 WL 1354041, *5 (spraying of pollutants from helicopters into the air, which eventually landed on navigable waters was a discharge from a point source).

and without any discussion. *See* 309 F.3d at 1185. The Second Circuit, in *Peconic Baykeeper,* emphasized that the spray apparatus on the trucks and helicopters was the source of the discharge. 600 F.3d at 188-89. However, the Court did not hold, as Defendants suggest, that such an apparatus is required for there to be a discharge from a point source. Furthermore, the holding in *No Spray Coalition* that helicopters used to convey "pollutants from their original source to the navigable water . . . most certainly constitute point sources under the CWA" did not depend on the channelization of the pollutant stream. 2005 WL 1354041, *4-5.

Defendants further misconstrue the holdings and facts of these cases by asserting that applicators were "channel[ing] the emission stream and direct[ing] it toward the receiving water body." *See* Def. MSJ at 43. In *League of Wilderness Defenders*, the Ninth Circuit explained that the annual spraying of insecticide occurred "over 628,000 acres of national forest lands in Washington and Oregon." 309 F.3d at 1182. At issue was not the spraying of pesticides "directly into waters," as Defendants would like to contend, but rather the spraying of pesticides in the general area above streams within the 628,000 acre area, such that some of the pesticide was likely to enter the streams. *Id.* at 1185. Furthermore, the Court enjoined all application until the Forest Service obtained an NPDES permit. *Id*. at 1193 (importantly, the Forest Service was enjoined from its spraying activities not because the intent was to spray pesticides directly into waters, but rather because an indirect result of spraying the Forests would be the discharge of pollutants into waters of the U.S.).

In both *Peconic Baykeeper* and *No Spray Coalition*, the court discussed spraying of pesticides directly over streams,[36] but the question of pesticides going into waters was only relevant to determine compliance with EPA-approved FIFRA labels. *Peconic Baykeeper*, 600

[36] There is a significant difference between Defendants' characterization of "direct[ing the pesticides] towards the receiving waterbody" (Def. MSJ at 43) and the actual inadvertent spray of pesticides from a plane that happens to fall into waters of the U.S.

F.3d at 187-88; *No Spray Coalition*, 2005 WL 1354041, at *8. At the time, a regulation was in place that protected pesticide dischargers from CWA liability if they were in compliance with the application requirements on a FIFRA label. *Peconic Baykeeper*, 600 F.3d at 186. It is worth noting that this regulation was vacated by the Sixth Circuit, holding that "the application of pesticides 'above' or 'near' waterways that leave 'excess' or 'residual' pesticides in navigable waters meets the CWA's definition of 'chemical waste.'" *Id*.

In *League of Wilderness Defenders*, *Peconic Baykeeper,* and *No Spray Coalition*, none of the courts were concerned with what happened between the discharge from the airplane, truck or helicopter and the point at which the pollutants landed in waters of the U.S.[37] Rather, all three courts focused on the point where the pollutants emanated from. As the District Court noted in *U.S. Pub. Interest Research Group v. Atl. Salmon of Maine, LLC*., "rather than focusing on pipes, conduits, and the channeling of water, as ASM suggests, the courts find that a point source exists where there is an *identifiable* source from which the pollutant is released." 215 F. Supp. 2d 239, 255 (D.Me. 2002). The focus for this Court should be no different. There is no dispute that the coal dust emanates from identifiable, discrete, discernible locations within the SCLF and is conveyed directly to Resurrection Bay, where it is discharged into waters of the U.S., thus requiring a CWA permit.[38]

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[37] *See also Weinberger v. Romero-Barcelo,* 456 U.S. 305, 309 (1982) ("the release of ordnance from aircraft or from ships into navigable waters is a discharge of pollutants); *United States v. West Indies Transp., Inc.,* 127 F.3d 299, 308 (3d Cir. 1997), *cert. denied,* 522 U.S. 1052 (1998) (barge from which cement blocks were dumped and paint chips from sandblasting were projected is a point source); *Stone v. Naperville Park Dist.,* 38 F.Supp.2d 651, 655 (D.Ill. 1999) (shooting range where lead shots and air borne clay targets ultimately land in the water is a point source).

[38] Defendants and *Amicus* condemn ACAT's claims because of the alleged broad-reaching impacts of regulating pollutants discharged into navigable waters via wind under the CWA. *See* Def. MSJ at 48-49; *Amicus* Brief (Doc. 103-1) at 12-14. This position ignores and is flatly inconsistent with the primary objective of the CWA, which is to "restore and maintain the chemical, physical, and biological integrity of the Nation's Waters." 33 U.S.C. § 1251(a). The prohibition under the CWA is simple. Section 301(a) categorically prohibits the discharge of any

2. Discharges of coal dust are a result of human activities at the SCLF.

Liability under the CWA is established when a person discharges a pollutant into navigable waters without a permit.[39] *Comm. to Save Mokelumne River v. East Bay Mun. Util. Dist.*, 13 F.3d 305, 309 (9th Cir.1994). Even "unintentional discharges of pollutants" can be a violation of the Act. *Sierra Club v. Abston Const. Co.*, 620 F.2d 41, 46 (5th Cir. 1980). Defendants, however, insist that human participation and channelization is a necessary element for the Court to find a point source discharge. *See* Def. MSJ at 45-47. Aside from the plain language of the statute, this argument fails for several reasons. First, Defendants rely solely on stormwater run-off cases regarding point sources, which are inapplicable for the reasons set out above in Section III.C.1 at 38-44. However, assuming, *en arguendo*, the cases cited by the Defendants are applicable, they do not support Defendants' assertion that there must be human participation to establish a point source. Further, relevant case law establishes that stockpiles, such as the coal stockpiles at the SCLF, are point sources regardless of human activity. Finally, even if Defendants are correct that a point source requires human participation or facilitation, all discharges of coal dust into Resurrection Bay involve human activity at the SCLF.

Defendants cite three cases for the proposition that human participation is required for the court to find a point source discharge: (1) *Greater Yellowstone Coal.*,[40] (2) *Sierra Club v.*

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pollutant by any person from a point source into navigable waters without a permit. 33 U.S.C. § 1311(a). The legislative history for the CWA makes clear that the term "point source" is to be interpreted broadly. *See Nw. Envtl. Def. Ctr. v. Brown*, 640 F.3d 1063, 1071-72 (9th Cir. 2011) (quoting H.R.Rep. No. 92-911, at 125 (1971) and S.Rep. No. 92-414, at 51 (1971), 1972 U.S.C.C.A.N. 3668, 3760). Congress "sought to require permits for *any activity that met the legal definition of 'point source,' regardless of feasibility concerns*." *Id*. at 1072 (emphasis added) (quoting 118 Cong. Rec. 10765 (Mar. 29, 1972)). Once ACAT has established that the statutory requirements are met, then Defendants must obtain a CWA permit "regardless of feasibility concerns."

[39] "The regulatory provisions of the FWPCA [Federal Water Pollution Control Act, a 1972 amendment to the CWA] were written without regard to intentionality, ... making the person responsible for the discharge of any pollutant strictly liable." *U.S. v. Earth Sciences, Inc.*, 599 F.2d 368, 374 (10th Cir.1979).

[40] 628 F.3d 1143 (9th Cir. 2010).

Abston,[41] and (3) *Friends of Santa Fe Cnty.*.[42] The relevant portions of all three cases concern stormwater – either run-off or groundwater seepage[43] – both of which are substantially different from direct non-stormwater discharges.[44]

A point source is "any discernible, confined, and discrete conveyance." 40 C.F.R. § 122.2. However, stormwater discharges are distinct from classic point source discharges, as applicable regulations require that the stormwater run-off be actively "collect[ed] and convey[ed]" to be regulated as a point source under the act. 40 C.F.R. § 122.26(b)(14). The difference between these two definitions is based on the fact that stormwater is not created by the regulated entity. Importantly, stormwater only comes from a point source, regulated under the Act, when it is collected and conveyed. 40 C.F.R. § 122.26(b)(14); *Nw. Envtl. Def. Ctr.*, 640 F.3d at 1071. Thus, any requirement for human direction is solely applicable to stormwater discharges and is irrelevant in the context of direct discharges, such as those present in this case.

In sharp contrast to stormwater, coal dust is created by the Defendants and is discharged into Resurrection Bay as a result of SCLF activities from the conveyor system, stacker/reclaimer, train unloader, shiploaders, and bulldozers. The discharge of coal dust is indisputably controlled by, and the result of, Defendants' activities.[45] *See supra* Section III.C.1 at 41. Discharges of coal dust from these SCLF components all originate from "discernible, confined, and discrete"

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[41] 620 F.2d 41 (5th Cir. 1980).
[42] 892 F.Supp. 1333 (D.N.M. 1995).
[43] *Greater Yellowstone Coalition*, 628 F.3d at 1152-53 (distinguishing stormwater runoff and ground water seepage); *Abston Const. Co.*, 620 F.2d 41 (evaluating *Friends of Santa Fe Cnty.*, 892 F.Supp. at 1359 (court compared groundwater seepage to stormwater and determined that seepages are similar.)
[44] *Cf. Beartooth Alliance v. Crown Butte Mines*, 904 F.Supp. 1168, 1173 (D.Mont. 1995) (holding that nonpoint sources are "limited to uncollected runoff water that is difficult to ascribe to a single polluter.").
[45] *See Comm. to Save the Mokelumne River v. East Bay Mun. Util. Dist.*, 37 Env't Rep. Cas. (BNA) 1159, 1170 (E.D.Cal. 1993), *aff'd* 13 F.3d 305 (9th Cir. 1993) (*citing Friends of the Sakonnet v. Dutra*, 738 F.Supp. 623, (D.R.I. 1990)) ("The causation requirement can be met because of a defendant's control over discharges.").

conveyances (as well as clear human activities at the SCLF that result in the origination of the discharge).

Nonetheless, even if the cases cited by Defendants were applicable, none of the three cited cases support Defendants' contention that active human participation at the time of discharge is a required element for there to be a point source. *See* Def. MSJ at 45-47. The Fifth Circuit, in *Abston Const. Co*., specifically found that nothing in the CWA relieves dischargers from liability where pollutants were conveyed by natural means. 620 F.2d at 45. In fact, the Fifth Circuit expressly rejected the lower court's conclusion that the defendants' discharge piles were not point sources because "the pollution had not resulted 'from any affirmative act of discharge by the defendants.'" *Id.* at 43-44. The Fifth Circuit explained that even if the alleged discharger did "nothing beyond the mere collection of rock and other materials" into piles at the facility, the conveyance of these materials could subject the facility to liability under the CWA. *Id.* at 45. Indeed, the facts of *Abston Const. Co*. show that all the company did was remove overburden material and push it aside until spoil piles formed. *Id.* at 43.

As the District of Oregon Court noted, "[i]n accepting the Tenth and Fifth Circuit's reasoning, the Ninth Circuit has indicated that the discharger *does not need to be actively conveying the pollutants to navigable waters* – only that the discharger collected the discharged material prior to the discharge." *See Umatilla Waterquality Protective Ass'n, Inc. v. Smith Frozen Foods, Inc*., 962 F. Supp. 1312, 1321 (D. Or. 1997) (emphasis added) *citing Earth Sciences, Inc.,* 599 F.2d at 37 and *Abston Const. Co.*, 620 F.2d at 44-45. The court found it more important whether the source of pollutants – a brine pond – was readily identifiable as a single source. *Id*. It was irrelevant that the pollutants migrated through the dirt before reaching waters of the U.S. *Id*. Rather, the question for the court was whether there was a hydrologic connection via groundwater between the source – the brine pond – and waters of the U.S. *Id.* In this case, on the

other hand, the Court is not faced with discerning whether there is a hydrologic connection via groundwater as the pollutant goes directly from the source to waters of the U.S. via wind.

Moreover, Defendants' reliance on *Friends of Santa Fe County* is equally unsupportive. *See* Def. MSJ at 47. In that case, the District of New Mexico found that an overburden pile was a discernible, confined, and discrete conveyance that could "readily constitute [a] point source . . . ." 892 F.Supp. at 1359. The District Court did not hold that for a pile to be a point source there had to be human direction. *Id.* In fact, none of the cases cited by Defendants require active human direction in order for a court to find that a direct discharge originated from a point source.

As cited in ACAT's Motion for Summary Judgment brief, there are several cases, as well as EPA guidance, that define stockpiles as common point sources. *See* Pltffs. MSJ (Doc. 120) at 33-34. Furthermore, Defendants mischaracterize the activities that result in the creation of coal dust, which is then blown into Resurrection Bay. While wind certainly carries coal dust downwind from the SCLF and into Resurrection Bay, the origination of the coal dust comes from human activities at the SCLF. Operation of the stacker/reclaimer, railcar unloader, conveyor belts, the shiploader and bulldozers all create coal dust at the SCLF. *See supra* Section III.C.1. at 39. Furthermore, the size, shape, and moisture content of the coal piles – all of which affect the potential for the piles to generate dust – result directly from human activity.[46] Quite simply, the discharge of coal dust is not an uncontrolled natural phenomenon, and it is not analogous to situations like those in *Friends of Santa Fe*, where the seepage into groundwater from the facility was not found to constitute a point source. In fact, Defendants grossly misrepresent the discharges at issue in this case by asserting that coal dust is not subject to human direction as it is Defendants' operational activities that are responsible for the majority of coal dust being discharged into Resurrection Bay.

[46] *See* Klafka Report, Ex. JJ to Ashbaugh Decl. (Doc. 121-72) at 4.

IV. Defendants are Liable for the Unpermitted Non-Stormwater Discharges of Coal Plowed into Resurrection Bay and Other Waters of the United States.

ACAT has produced evidence establishing Defendants ongoing non-stormwater discharges of coal-contaminated snow into Resurrection Bay and into a pond and adjacent wetlands north of the coal stockpiles. As discussed above, none of these discharges are authorized – explicitly or implicitly – under the MSGP.

Coal regularly accumulates on the SCLF's dock. *See* Ex. 11 to Pltffs. MSJ (Doc. 125-1), Stoltz Depo., at 136:10-20 (acknowledging that coal continues to spill from the ship loader during the loading of ships and noting in reference to the last ship load that there may be anywhere from 500 to 1,000 pounds of coal on the dock below the ship loader). Coal dust from the Facility's operations also settles onto the dock. *See* Ex. BB to Ashbaugh Decl. (Doc. 121-52) at 3 (February 19, 2010, DEC inspection report noting that "[c]oal dust and chunks had accumulated on the dock."). During the winter, when there is snow on the dock, this coal and coal dust accumulates on the snow. Defendant Alaska Railroad's own facility manager at the SCLF acknowledged under oath that he has personally observed snow fall through the dock and into Resurrection Bay. *See* Ex. 90 to Pltffs. MSJ, Deposition of Paul Farnsworth ("Farnsworth Depo.") (Doc. 125-3) at 113:3-114:6. This deposition testimony corroborates direct first-hand observations of contaminated snow being discharged from the dock. *See* Maddox Decl. (Doc. 106) at ¶ 33. Defendants have not shown that they have taken any action to seal the gaps in the dock or otherwise prevent contaminated snow falling through those gaps from reaching Resurrection Bay. Coal-contaminated snow falling through the dock and into Resurrection Bay constitutes unpermitted non-stormwater discharges under the CWA.

Defendants also discharge coal-contaminated snow into a pond and adjacent wetlands when they plow this snow into those areas. A pond is located north of the coal stockpiles. *See* Ex. 3 to Pltffs. MSJ (Doc. 120-3) and 4 (Doc. 120-4) at 41; *see* Ex. 90 (Doc. 125-3), Farnsworth Depo. at 32:22 to 33:6. Defendants store snow north of the coal stockpiles. *See* Ex. 11 to Pltffs.

MSJ (Doc. 125-1), Stoltz Depo., at 148:23 to 149:2. Defendants regularly plow coal-contaminated snow directly onto the pond and adjacent wetlands. *See* Maddox Decl. (Doc. 106) at ¶ 26 and Maddox Decl. Ex. 20 (Doc. 106-38). Coal-contaminated snow discharged from the plow – a recognized point-source under the CWA (*see, e.g., Borden Ranch Partnership*, 261 F.3d at 815) – into jurisdictional waters of the U.S. constitutes unpermitted non-stormwater discharges.

CONCLUSION

Defendants are discharging coal into Resurrection Bay and a pond and without a CWA permit. These discharges are not stormwater discharges and are not authorized – explicitly or implicitly – by Defendants' Stormwater Permit. Accordingly, Defendants cannot avail themselves of the permit shield defense. Further, regulation of the Facility under the CAA has absolutely no bearing, whatsoever, on whether the Facility is complying with the CWA. Moreover, Defendants' argument that neither DEC nor EPA have brought an enforcement action under the CWA for these discharges is immaterial to whether Defendants are complying with the Act. Defendants' reliance on case law that defines whether stormwater run-off falls under the jurisdiction of the CWA is misplaced. The stormwater case law is irrelevant to the determination of whether coal dust released from discrete, specific locations at the Facility are point source discharges. Finally, the opinion of a DEC regulator that the Facility does not need a separate CWA permit for these discharges is neither entitled to deference nor persuasive. The CWA is clear that a person must have a permit to discharge pollutants into waters of the U.S. Consequently, the Court should deny Defendants' Motion for Summary Judgment.

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Respectfully submitted,

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I certify that on June 11, 2012, a copy of the **Plaintiffs' Memorandum of Point and Authorities in Support of Motion for Summary Judgment** was served electronically upon:

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